(9)

No. 84-335-CFX
Status: GRANTED

Title: John N. Mitchell, Petitioner
v.
Keith Forsyth

Docketed:
August 31, 1984

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Rudovsky, David

| Entry | Date | Note | Proceedings and Orders |
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| 1 | Jun 22 1984 | | Application for extension of time to file petition and order granting same until August 31, 1984 (Brennan, June 25, 1984). |
| 2 | Aug 31 1984 | G | Petition for writ of certiorari filed. |
| 3 | Aug 31 1984 | | Appendix of petitioner John N. Mitchell filed. |
| 4 | Sep 28 1984 | | Brief of respondent Keith Forsyth in opposition filed. |
| 5 | Oct 3 1984 | | DISTRIBUTED. October 26, 1984 |
| 6 | Oct 24 1984 | X | Reply brief of petitioner John N. Mitchell filed. |
| 7 | Oct 29 1984 | | Petition GRANTED. Justice Rehnquist OUT. |
| | | | ********** |
| 9 | Dec 12 1984 | | Order extending time to file brief of petitioner on the merits until December 19, 1984. |
| 10 | Dec 13 1984 | | Joint appendix filed. |
| 11 | Dec 19 1984 | | Brief of petitioner John N. Mitchell filed. |
| 12 | Jan 4 1985 | | SET FOR ARGUMENT. Wednesday, February 27, 1985. (4th case.) |
| 14 | Jan 11 1985 | | Record filed. |
| 15 | Jan 12 1985 | | Record filed. |
| 16 | Jan 17 1985 | | 1 env. of documents No. 68, 81, 82, et al. received. |
| 17 | Jan 19 1985 | | Brief of respondent Keith Forsyth filed. |
| 18 | Jan 28 1985 | | CIRCULATED. |
| 19 | Feb 20 1985 | X | Reply brief of petitioner John N. Mitchell filed. |
| 20 | Feb 27 1985 | | ARGUED. |



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CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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JOHN N. MITCHELL, PETITIONER

*v.*

KEITH FORSYTH

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a *Bivens* suit on the ground that the legal standards allegedly violated were clearly established at the time in question.

2. Whether petitioner was entitled to qualified immunity in this case.

3. Whether the Attorney General is entitled to absolute immunity when he makes decisions in the area of national security.

## PARTIES TO THE PROCEEDINGS

In addition to petitioner, the following parties were defendants in the district court: Richard G. Kleindienst; L. Patrick Gray, III; Albert Cooper; and E. Davis Porter. Respondent Keith Forsyth was the only plaintiff.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

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No.

JOHN N. MITCHELL, PETITIONER

*v.*

KEITH FORSYTH

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

The Solicitor General, on behalf of John N. Mitchell, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 729 F.2d 267. The opinion of the court of appeals on respondent's motion to dismiss the appeal (App., *infra*, 31a-42a) is reported at 700 F.2d 104. The opinion of the district court (App., *infra*, 52a-77a) is reported at 551 F. Supp. 1247. The prior opinion of the court of appeals (App., *infra*, 83a-116a) is reported at 599 F.2d 1203. The initial opinion of the district court (App., *infra*, 44a-50a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered March 8, 1984. A petition for rehearing was denied on April 3, 1984 (App., *infra*, 81a-82a). On June 25, 1984, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. (1976 ed.) 2511(3)[1] provided in pertinent part:

> Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial[,] hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

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[1] 18 U.S.C. (1976 ed.) 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute, which established procedures for the conduct of electronic surveillance for national security purposes, was enacted eight years after the events that gave rise to this litigation.

## STATEMENT

1. In June 1970, the Philadelphia office of the Federal Bureau of Investigation learned from a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to destroy the underground utility tunnels serving a portion of the federal enclave in Washington, D.C., as a Washington's Birthday protest of the Vietnam War. The FBI also learned that the ECCSL already had been successful in carrying out several raids on draft board offices. In August 1970, the FBI further learned that three ECCSL members, including William Davidon, a professor at Haverford College, had discussed a plan to kidnap Henry A. Kissinger, then Assistant to the President for National Security Affairs, simultaneously with the destruction of the utility system. This latter information was conveyed to the White House in addition to the Attorney General. App., *infra*, 85a-86a, 120a-121a.[2]

After additional investigation, Attorney General Mitchell on November 6, 1970, approved the FBI Director's request to place a telephone surveillance on Davidon's home telephone. The primary purpose of this surveillance was to gather intelligence information about the ECCSL's plans, although it was anticipated that information of a criminal evidentiary nature might also be obtained. The wiretap was discontinued on January 6, 1971. During the surveillance, conversations between Davidon and respondent Keith Forsyth were overheard on three occasions. App., *infra*, 85a-86a.

At the time of the Davidon surveillance, the only two federal courts that had considered the question had held that

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[2] During his deposition in this case, Attorney General Mitchell recalled that Dr. Kissinger was provided Secret Service protection in light of the kidnap threat (Mitchell Dep. 60). At that time, Dr. Kissinger was engaged in secret peace negotiations with the North Vietnamese in Paris (Mitchell Dep. 60-62). These facts added a further dimension to the security concerns presented by the kidnap threat.

the President was permitted to order domestic security wiretaps without obtaining a warrant (see cases cited at App., *infra*, 23a). In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court had expressly reserved decision on whether national security surveillances generally required warrants, and conflicting views on the question had been expressed by individual Justices in concurring opinions. Compare *id.* at 359-360 (Douglas, J., joined by Brennan, J., concurring) with *id.* at 362-363 (White, J., concurring). The federal wiretapping statute also provided no definitive answer to this question. Shortly after *Katz* was decided, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, to govern the use of wiretaps. However, a provision of that Act, 18 U.S.C. (1976 ed.) 2511(3), "ma[de] clear that the Act simply did not legislate with respect to national security surveillances." *United States* v. *United States District Court*, 407 U.S. 297, 306 (1972) (footnote omitted) [hereinafter cited as *Keith*].

2. After respondent Forsyth learned of the wiretap, he instituted this action in the United States District Court for the Eastern District of Pennsylvania against Attorney General Mitchell and two FBI employees who had installed and maintained the electronic surveillance.[3] Respondent sought damages for the three overhearings of his telephone conversations, claiming that the warrantless electronic surveillance violated Title III and the First, Fourth, and Ninth Amendments to the Constitution.[4]

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[3] Respondent also named as defendants former Attorney General Richard G. Kleindienst and former Acting FBI Director L. Patrick Gray III. These defendants' respective terms of office did not coincide with the period of the surveillance, and accordingly the claims against them were voluntarily dismissed in the district court.

[4] One other damages action based upon the Davidon surveillance is still pending against petitioner. That suit, *McAlister* v. *Kleindienst*, Civ. Action No. 72-1977 (E.D. Pa.), filed by Davidon and another person overheard on the surveillance, has been stayed pending disposition of appellate proceedings here. In another suit, which was based both upon the Davidon surveillance and another wiretap, the district court recently granted summary judgment for petitioner, holding that the illegality of the wiretaps was not clearly established at the time in question. *Burkhart* v. *Saxbe*, Civ. Action No. 74-826 (E.D. Pa. Aug. 23, 1984) (see App., *infra*, 143a-155a).

After discovery, which included the former Attorney General's deposition, a motion for summary judgment was filed urging that the case be dismissed on absolute and qualified immunity grounds. The district court denied this motion (App., *infra*, 117a-142a). The court held (*id.* at 134a-137a) that the Attorney General was not entitled to absolute immunity under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), because he was functioning as an administrator rather than as a prosecutor. The court also held (App., *infra*, 140a-142a) that the claim of qualified immunity could not be resolved on a motion for summary judgment. Applying the qualified immunity standard articulated in *Butz* v. *Economou*, 438 U.S. 478 (1978), the court concluded that there were genuine (but unspecified) issues of material fact "in connection with the defendants' affirmative defense of good faith" (App., *infra*, 142a).

3. On appeal from the denial of the motion for summary judgment, the court of appeals held that it had jurisdiction to review only the district court's denial of absolute immunity (App., *infra*, 89a-95a). On the merits of this issue, the court concluded (*id.* at 95a-111a) that, under *Butz* v. *Economou*, 438 U.S. at 515, the Attorney General is absolutely immune from personal damages liability for his official acts only when performing the functions of a prosecutor. The court rejected any notion that broader absolute immunity was needed to protect the Attorney General from harassing lawsuits because, in the court's view, "*Butz* * * * was unconcerned with this problem" (App., *infra*, 101a). The court of appeals remanded the case to the district court to consider whether, in authorizing the electronic surveillance challenged by respondent, the Attorney General was exercising a prosecutorial function or was engaged in "purely investigative or administrative function[s]" (App., *infra*, 111a). A petition for a writ of certiorari was denied (453 U.S. 913 (1981)), after this Court was unable to render an opinion on related immunity issues in *Kissinger* v. *Halperin*, 452 U.S. 713 (1981).

On remand, the district court again denied petitioner's claim to absolute immunity (App., *infra*, 54a-60a). The court also rejected petitioner's claim to qualified immunity

under the new legal standard articulated in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (App., *infra*, 60a-77a). The district court concluded that petitioner had violated a warrant requirement that was "clearly established" long before this Court addressed the national security warrant question "for the first time" in *Keith* (407 U.S. at 299). To support this conclusion, the district court cited (App., *infra*, 64a-66a) this Court's holding in *Katz* that nontrespassory surveillances generally require warrants absent exigent circumstances, as well as the concurring opinion of Justice Douglas, joined by Justice Brennan, which the district court stated "should have provided particular guidance to [petitioner] and all other attorneys regarding the constitutionality of warrantless domestic national security wiretaps" (App., *infra*, 65a). The court also concluded (*id.* at 64a) that "the Justice Department had reason to know that its position regarding the need for a warrant was subject to both question and attack" because the constitutionality of the surveillance involved in *Keith* had been challenged in a motion filed in the underlying criminal proceedings "more than one month prior to the Attorney General's authorization of the [Davidon] wiretap" (App., *infra*, 64a). Finally, the court concluded (*id.* at 67a) that "the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III."

The district court held that petitioner was liable for the alleged violations and set the case for an evidentiary hearing "to determine whether the plaintiff is entitled to punitive damages and/or compensatory damages" (App., *infra*, 76a).[5] In a later ruling, the court declined to certify its order for interlocutory appeal (*id.* at 44a-50a).

4. Petitioner appealed under 28 U.S.C. 1291 and also filed a petition for mandamus, contending that his claims of absolute and qualified immunity had been wrongly denied. Respondent moved to dismiss the appeal for lack of a final,

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[5] The district court also held that trial was required on the question of the liability of the two FBI employees who actually intercepted respondent's conversations pursuant to the Attorney General's authorization. Respondent subsequently dismissed his claims against the FBI employees.

appealable order. A motions panel of the court of appeals denied this motion in part (App., *infra*, 31a-43a). The panel held (*id.* at 34a, 43a) that denial of a claim of absolute immunity is immediately appealable and referred the question whether a denial of qualified immunity was appealable as a collateral order to the merits panel. The motions panel stayed further proceedings below, noting that a trial on punitive damages would involve an inquiry into petitioner's motivation and the advice he received from subordinates in the Department of Justice that might be "as searching as the trial on the merits would have been" (*id.* at 34a). The motions panel further noted (*id.* at 33a n.2) that the district court's ruling on the state of law in 1970 and 1971 governing domestic security wiretaps differed from that of the District of Columbia Circuit in *Sinclair* v. *Kleindienst*, 645 F.2d 1080 (1981).

In the decision that we now seek to have reviewed, the merits panel first held (App., *infra*, 8a-12a) that petitioner was not entitled to absolute immunity. This Court's intervening decision in *Harlow* had recognized (457 U.S. at 812) that absolute immunity might be justified "to protect the unhesitating performance" of vital functions by government officials responsible for decisions in "such sensitive areas as national security or foreign policy." However, the court of appeals declined to address this portion of the *Harlow* opinion. Instead, the court observed (App., *infra*, 9a-12a) that *Harlow* had not changed the analysis of absolute immunity in *Butz* and that petitioner's claim of absolute immunity under the *Butz* analysis had been "'*sub silentio* rejected'" in the court of appeals' prior opinion.

The court of appeals then held (App., *infra*, 12a-15a) that the denial of petitioner's claim of qualified immunity was not appealable under the collateral order doctrine. The court expressed the fear (*id.* at 15a) that accepting jurisdiction over this issue would "subject our colleagues to unnecessary additional burdens by opening the sluice gates." The court denied petitioner's mandamus petition "for the same reasons" *(ibid.)*.

Judge Weis dissented (App., *infra*, 15a-29a). Agreeing with decisions of the District of Columbia and Eighth Cir-

cuits, he first concluded (*id.* at 16a-20a) that the collateral order doctrine permits an immediate appeal when a claim of qualified immunity is denied on the ground that the legal standard allegedly violated was clearly established at the time in question.

Turning to the merits of the qualified immunity issue, Judge Weis reviewed at length (App., *infra*, 20a-28a) the state of the law in 1970 and early 1971 regarding warrantless national security wiretaps and concluded that "[u]nquestionably, a prohibition against warrantless searches in these circumstances was not 'clearly established'" (*id.* at 28a).

On the issue of absolute immunity, Judge Weis noted (App., *infra*, 20a) that the claim then before the court, based on the Attorney General's special functions in the area of national security, was different from the claim, based on *Imbler* v. *Pachtman*, *supra*, that had been reviewed in the prior appeal. He wrote that "*Harlow's* discussion of the 'special functions' test, as it might apply to the Attorney General in cases implicating national security, lends a force to the defendant's argument here that was lacking in *Forsyth I*" (App., *infra*, 20a). Judge Weis did not address the absolute immunity issue further, however, in light of his conclusion that petitioner was entitled to qualified immunity *(ibid.)*.

A petition for rehearing and suggestion for rehearing en banc was denied on April 3, 1984, with four of the ten active judges voting to rehear the case en banc (App., *infra*, 81a-82a).

## REASONS FOR GRANTING THE PETITION

This case presents important and unsettled questions concerning the immunity of government officials who are sued for damages based upon the performance of official acts. Contrary to decisions of three other courts of appeals, the court below held that the collateral order doctrine does not permit an appeal when a claim of qualified immunity is rejected on purely legal grounds. This holding will frustrate one of the chief purposes of qualified immunity, *i.e.*, the prompt termination of insubstantial *Bivens* suits.

Contrary to a decision of the District of Columbia Circuit on virtually identical facts, and another district court decision involving the very same wiretap, the district court in this case held that petitioner's conduct violated "clearly established" legal standards and thus does not merit qualified immunity. This unsupportable holding, which the court of appeals refused to correct on appeal or mandamus, deserves review and reversal so that this meritless litigation will terminate.

Finally, the court below, while recognizing that the Attorney General, like all other government lawyers, is absolutely immune when performing even the most mundane prosecutorial functions, held that the Attorney General has no unqualified immunity when he makes critical decisions regarding national security. This potentially dangerous holding also merits review.

1. The court of appeals refused to consider petitioner's entitlement to qualified immunity. Holding that the district court's denial of petitioner's claim to qualified immunity was not a final appealable order under 28 U.S.C. 1291, the court dismissed this aspect of the appeal. This dismissal of the qualified immunity appeal conflicts with *Krohn* v. *United States*, No. 83-1839 (1st Cir. Aug. 22, 1984); *Evans* v. *Dillahunty*, 711 F.2d 828 (8th Cir. 1983), and *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982), and is based on a misapplication of the collateral order doctrine articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[6]

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[6] In *Bever* v. *Gilbertson*, 724 F.2d 1083 (4th Cir. 1984) (rehearing denied by equally divided court), petitions for cert. pending, Nos. 84-25, 83-2139, the court held in a case involving state officials that the rejection of a qualified immunity claim is not appealable where there are overlapping claims for injunctive relief that would require trial in any event. There are no such overlapping claims in this case.

In *Benford* v. *American Broadcasting Companies, Inc.*, No. 83-1168 (4th Cir. Apr. 11, 1983), cert. denied, No. 82-2145 (Oct. 3, 1983), the court held in an unpublished opinion that the collateral order rule did not permit an appeal from an order denying qualified immunity where "the disappointed movants [could] still present facts at trial in support of their immunity defense" (82-2145 Pet. App. 9A). In this case, by contrast, petitioner's immunity claim has been conclusively rejected, and liability has been imposed.

In *Cohen*, the Court held that certain interlocutory orders are immediately appealable under 28 U.S.C. 1291. To fall within the *Cohen* rule, an order must "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (337 U.S. at 546). See also, *e.g.*, *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 6; *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Applying this rule, the Court has repeatedly held that orders denying claims of absolute immunity are appealable. *Nixon* v. *Fitzgerald*, 457 U.S. at 741-743 (claim of immunity for the President); *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979) (claim of immunity under Speech or Debate Clause); *Abney* v. *United States*, 431 U.S. 651, 656-663 (1977) (claim of immunity under the Double Jeopardy Clause); see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 n.11, 813-820 (1982) (considering both absolute and qualified immunity questions on a collateral order appeal).

An appeal should likewise be allowed in the present case, where petitioner's claim of qualified immunity was rejected on the ground that petitioner's undisputed conduct violated a legal standard that was "clearly established" at the time in question. The order rejecting petitioner's claim meets all of the requirements of the collateral order doctrine. First, it conclusively settled petitioner's entitlement to qualified immunity and indeed established his liability. Trial of the remaining issue of damages will not affect those determinations. Second, the issue of qualified immunity is of unquestionable importance, as *Harlow* pointed out (457 U.S. at 814), because it protects public officials from the burdens and distractions of meritless lawsuits. In addition, the question of qualified immunity, which depends upon whether the applicable legal standard was clearly established in 1970 and 1971, is quite separate both from the issue of whether the petitioner's conduct violated the Fourth Amendment, which was settled in *Keith* in 1972, and from the question of damages, which, as the motions panel ob-

served, turns on the very inquiry into subjective intent that this court sought to avoid by announcing a new qualified immunity test in *Harlow*.

Third and most important, if the denial of a qualified immunity claim must await final judgment, the defendant official's right to avoid trial on meritless claims will be irretrievable lost. *Krohn* v. *United States*, slip op. 9-11. In *Harlow*, this Court revised the qualified immunity standard to provide, as a matter of strong public policy, that government officials should not be subject "either to the costs of trial or to the burdens of broad-reaching discovery" where they have not violated clearly established rights (457 U.S. at 817-818). As the dissenting judge below recognized, under *Harlow* "avoiding trial through prompt disposition of insubstantial claims by summary judgment is as compelling an objective in cases properly invoking qualified immunity as in those where absolute immunity is available" (App., *infra*, 18a). Consequently, "[i]t follows inexorably that withholding appellate correction of erroneous pre-trial denials of qualified immunity frustrates *Harlow's* purpose in revising the test" *(ibid.)*.

The court of appeals in this case was unwilling or unable to come to grips with the clearly established rules governing the collateral order doctrine. Instead of considering whether those rules are satisfied by the denial of a qualified immunity claim under *Harlow*, the court rested upon its prior treatment of the issue of appealability, which antedated *Harlow's* reformulation of the qualified immunity defense (App., *infra*, 12a-14a). The court also protested (*id.* at 14a-15a) that its docket was already "crushing" and suggested that qualified immunity claims had been entertained in interlocutory appeals in *Harlow* and *McSurely* only because the claims were "insubstantial."

These arguments are plainly unsound. *Harlow* significantly changed the standard for qualified immunity, and three courts of appeals have concluded, in light of that change, that the denial of a qualified immunity claim is appealable. The Third Circuit's refusal to reconsider its prior ruling on appealability in light of *Harlow* was unjustified. Likewise, the court's crowded docket is not a legitimate

ground for refusing to entertain an appeal as of right under 28 U.S.C. 1291.[7] And there is no hint in *Harlow* or *McSurely* that the appeals were entertained in those cases only because the merits of the plaintiffs' claims had been prejudged and found to be insubstantial. Nor are we aware of any precedent for such a procedure in appeals under 28 U.S.C. 1291.[8]

The present case strikingly shows why the denial of qualified immunity claims should be appealable. It is obvious—as the D.C. Circuit has held, as another district court has concluded in a case involving the same wiretap at issue here (see page 14, *infra*), as Judge Weis demonstrated in dissent below, and as we will show—that the illegality of warrantless domestic national security wiretaps was *not* clearly established in 1970 or early 1971. The district court reached the contrary conclusion on untenable grounds but refused to certify this dispositive question for appeal under 28 U.S.C. 1292(b). The court of appeals refused to entertain petitioner's appeal under the collateral order doctrine, refused to address the well established rules governing such appeals, and denied petitioner's mandamus petition without explanation, thereby subjecting petitioner to an unnecessary and potentially protracted trial on the issue of his subjective good faith. The prospect of such treatment will "'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (*Harlow*, 457 U.S. at 814 (citation omitted)).

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[7] Moreover, as the dissent recognized, district court docket pressures also are important, and "[s]ound judicial administration argues against declining a meritorious appeal when the result is to require a district court to hold a useless trial" (App., *infra*, 28a).

[8] The court of appeals in this case found that respondent's claims were not insubstantial solely because the district court had concluded that petitioner had violated a clearly established legal standard (App., *infra*, 14a). The court of appeals did not examine the merits of the district court's determination. Thus, by the court of appeals' reasoning, a *Bivens* defendant will never be allowed to appeal when a qualified immunity claim is denied on purely legal grounds. In all such cases, the district court will have held that a clearly established legal standard was violated, and the plaintiff's claims will accordingly be deemed substantial.

The appealability of orders denying qualified immunity is an important question on which the courts of appeals are in conflict. Resolution by this Court is needed and warranted.

2. Because it held that it lacked jurisdiction, the court of appeals did not review what may be the most egregious aspect of the district court's decision, the rejection of petitioner's qualified immunity claim. In the district court's view, this Court's opinion in *Katz* "clearly stated more than three years before the installation of the Davidon wiretap that a warrant was required for such electronic surveillance" (App., *infra*, 70a). Consequently, petitioner was held liable because he "ignore[d] what the Supreme Court [in *Katz*] has previously determined to be a requirement of the Constitution" (*ibid.*).

The district court's error is manifest and not open to serious question. In *Katz*, this Court expressly reserved decision on whether a warrant was required for national security surveillances. 389 U.S. at 358 n.23. Five years later, when the question was decided in *Keith*, the Court began by acknowledging (407 U.S. at 299 (emphasis added; footnote omitted)) that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, *without guidance from the Congress or a definitive decision of this Court.*" The Court added (*ibid.*): "This case brings the issue here for the first time."[9]

Prior to *Keith*, the lower courts were divided on the question. See *United States* v. *United States District Court*, 444 F.2d 651, 656 & n.2 (6th Cir. 1971) (citing cases). And when petitioner authorized the surveillance at issue here, "the sparse lower federal court case law *unanimously* supported the theory that no warrant was required in national security cases" (App., *infra*, 23a) (emphasis added) (Weis, J., dissenting).

The district court's conclusion that petitioner violated clearly established law is plainly wrong. As the dissenting judge below noted, "a review of Supreme Court and other

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[9] The Court similarly noted (407 U.S. at 309) that it was "address[ing] a question left open by *Katz*, *supra*, at 358 n.23."

federal court decisions, the statutory provisions, and scholarly commentary all demonstrate that the law of warrantless electronic surveillance in national security cases was only beginning to develop in 1970-71" (App., *infra*, 27a-28a).

In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084-1085 (1981), the District of Columbia Circuit held that petitioner did not violate a clearly established standard when he authorized wiretaps that terminated in January 1971, shortly *after* those at issue here. In *Zweibon* v. *Mitchell (Zweibon IV)*, 720 F.2d 162 (D.C. Cir. 1983), petition for cert. pending, No. 83-2005, the court held that the illegality of such warrantless wiretaps was not clearly established in March or July 1971. Recently, another district court judge in the Eastern District of Pennsylvania reached the same conclusion in another case concerning the same wiretap at issue here. *Burkhart* v. *Saxbe*, Civ. Action No. 74-826 (E.D. Pa. Aug. 23, 1984) (VanArtsdalen, J.). (App., *infra*, 143a-154a). See also *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978) (holding that *Keith* was not "clearly foreshadowed" and therefore should not be applied retroactively for damages purposes).[10] As a consequence, petitioner's entitlement to at least a qualified immunity is clear under *Harlow*.

The district court's reasoning is as disturbing as its ultimate conclusion. In the district court's view, an Attorney General must heed the most fleeting harbingers of change in constitutional doctrine if he is to avoid personal liability. The court faulted petitioner because "more than one month prior to the Attorney General's authorization of the wiretap at issue in this case" a defense motion filed in the district court proceedings that gave rise to *Keith* should have given "the Justice Department * * * reason to know that its position regarding the need for a warrant was subject to both

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[10] The District of Columbia Circuit has held that *Keith* was foreshadowed by *Katz*. *Zweibon* v. *Mitchell (Zweibon III)*, 606 F.2d 1172, 1178-1181 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981), but the court later pointed out that "the 'clearly established' test for immunity purposes" is not "coterminous with the 'clearly foreshadowed' test courts employ to determine whether a judicial decision ought to be given retroactive effect." 720 F.2d at 172; see also *id.* at 172-173.

question and attack" (App., *infra*, 64a).[11] Petitioner also was faulted for failing to accept the views expressed in Justice Douglas's concurring opinion in *Katz*, which Justice Brennan joined. The district court wrote (App., *infra*, 66a):

> [I]n 1967, the *Katz* majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position [in another concurring opinion in *Katz*] would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost the gamble in *Keith*.[12]

The Attorney General cannot be subject to such restrictions. It is absurd to suggest that the Attorney General should require discontinuation of an investigative technique simply because it has been challenged by a defendant in a criminal case. By that reasoning, criminal investigations would come to halt. Nor should the Attorney General be required, at risk of personal liability, to follow individual expressions of views by a minority of this Court, especially where, as in *Katz*, other members of the Court express

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[11] The district court went on to conclude (App., *infra*, 64a) that "[a]fter January 24, 1971, the government had overwhelming reason to know that its conduct was unconstitutional" as a result of the district court's decision in *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), granting the defense motion noted above. This decision occurred *after* the Davidon surveillance, however, and the court ignored the two previous district court decisions holding that no warrant was required for domestic security surveillances. See *United States* v. *United States District Court*, 444 F.2d at 656 n.2.

[12] The district court also concluded that "the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III" (App., *infra*, 67a). This conclusion ignores the clear holding of *Keith* that "Congress only intended to make clear [by adding the national security proviso, 18 U.S.C. (1976 ed.) 2511(3)] that the Act simply did not legislate with respect to national security surveillances." 407 U.S. at 306 (footnote omitted).

seemingly contrary views.[13] Because the decision of the district court has a chilling effect on the conduct of the Attorney General's most central functions, review by this Court is justified to provide guidance to lower courts that must determine when a right becomes "clearly established" under *Harlow's* immunity inquiry.

3. The lower courts also erred in rejecting petitioner's claim of absolute immunity. In *Butz* v. *Economou*, 438 U.S. at 508, this Court held that "[a]lthough a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, [the Court's] decisions recognize that there are some officials whose special functions require a full exemption from liability." The Court stated (*ibid.* (quoting *Imbler* v. *Pachtman*, 424 U.S. at 421)) that this determination requires "'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'"

In *Harlow* (457 U.S. at 812), this Court listed decisionmaking in the area of foreign policy and national security as a "special function" that might well justify absolute immunity. The Court wrote (*id.* at 812 & n.18):

> For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. * * * Cf. * * * *Katz* v. *United States*, 389 U.S. 347, 364 (1967) (White, J., concurring) ("We should not require the warrant procedure and the magistrate's judgment if the President of the

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[13] In *Zweibon IV*, the court of appeals similarly rejected the plaintiffs' attempt to "'poll' the Supreme Court Justices on the scope of the national security exemption as of 1970" (720 F.2d at 172). The *Zweibon IV* court stated *(ibid.)*:

> Even ignoring the inherent difficulties and imprecision that must attend any "vote" based on statements made in other decisional contexts, appellants' "poll" proves nothing, since it applies a different test from that expounded in *Harlow*. The test for qualified immunity is "clearly established," not "clearly foreshadowed." The distinction is self-evident.

United States *or his chief legal officer, the Attorney General*, has considered the requirements of national security and authorized electronic surveillance as reasonable") (emphasis added).

The Court also noted that "a derivative claim to Presidential immunity [by a President's designee] would be strongest in such 'central' Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own" (457 U.S. at 812 n.19).

In this case, the court of appeals refused to heed *Harlow's* admonition and did not even consider whether the Attorney General's weighty responsibilities in the area of national security might constitute a special function justifying the protection of absolute immunity. Instead, the court rested upon its prior opinion holding that the Attorney General is entitled to absolute immunity only when he acts in a prosecutorial role. The court of appeals' refusal to recognize the Attorney General's absolute immunity in the sensitive and important area of national security may have dangerous consequences in future cases. Because of the importance of this issue, review by this Court is warranted.

Absolute immunity is justified in cases such as this so that government officials entrusted with the responsibility of protecting the country from foreign and domestic threats will not hesitate to discharge their responsibilities out of fear of personal liability. "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." *New York Times Co.* v. *United States*, 403 U.S. 713, 727 (1971) (Stewart J., concurring); see also *id.* at 741 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting). Furthermore, "the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect, and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *Keith*, 407

U.S. at 310. Thus, this Court has recognized "the constitutional basis of the President's domestic security role" (*id.* at 320), as well as the vital importance of that role (*id.* at 312):

> It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." * * * And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.

The importance of preserving the President's discretion, and that of his designees, in this sensitive and critical area has long been recognized by this Court in decisions that steadfastly have maintained that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); see also *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). When the President's designee performs national security functions, absolute immunity is required because here, perhaps more than with any other function, hesitation resulting from fear of personal liability carries grave risks to the nation as a whole and can least be tolerated.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1984

No. 84-335

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FILED
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ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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JOHN N. MITCHELL, PETITIONER

*v.*

KEITH FORSYTH

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE THIRD CIRCUIT

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No. 82-1812

---

KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, individually and as Attorney General of the United States, L. Patrick Gray, 3rd, individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE, ALBERT COOPER and DAVID PORTER

John N. Mitchell, Albert Cooper, and David Porter,

*Appellants.*

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APPEAL FROM THE UNITED STATES DISTRICT OCURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Civil No. 72-1920)

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No. 83-3150

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KEITH FORSYTH,

*Plaintiff-Respondent*

HON. RAYMOND J. BRODERICK,
United States District Judge

*Nominal Respondent*

*v.*

RICHARD G. KLEINDIENST, et al.,
*Defendants*

JOHN N. MITCHELL,
*Defendant-Petitioner*

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PETITION FOR A WRIT OF MANDAMUS

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Argued September 13, 1983
Before WEIS, HIGGINBOTHAM and
SLOVITER, *Circuit Judges.*
(Filed March 8, 1984)

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## OPINION OF THE COURT

HIGGINBOTHAM, A. LEON, JR., *Circuit Judge*.

This case involves former Attorney General John N. Mitchell's second interlocutory appeal from a denial of both absolute and qualified immunity for his authorization of unconstitutional FBI electronic surveillances of Keith Forsyth's telephone conversations with William Davidon. *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979) ("*Forsyth I*"), *cert. denied*, 453 U.S. 913 (1981), *reh. denied* 453 U.S. 928 (1981). We remanded the first interlocutory appeal directing the district court to decide a narrow factual question in the context of the absolute immunity test we enunciated in *Forsyth I*. However, we declined to consider the qualified immunity defense in *Forsyth I* because it was a non-appealable interlocutory order. On remand, the district court denied defendant Mitchell both absolute and qualified immunity.

Mitchell's appeal does not assert that the district court erred in the factual finding on remand or erred in its application of the *Forsyth I* test to that factual finding. Instead, he argues that two recent Supreme Court decisions, *Nixon v. Fitzgerald*, 102 S.Ct. 2690 (1982) ("*Nixon*") and *Harlow & Butterfield v. Fitzgerald*, 102 S.Ct. 2727 (1982) ("*Harlow*"), which were decided after *Forsyth I*, but before the district court's disposition of this case on remand, control this case and mandate the application of a test different from that enunciated in *Forsyth I*. Moreover, Mitchell argues that *Harlow* allows us to consider anew whether the interlocutory order denying qualified immunity may be appealed. Finally, Mitchell seeks a Writ of Mandamus on the issue of qualified immunity.

We hold that *Forsyth I*, as the law of the case, continues to control our disposition of this case. In our view, *Nixon* and *Harlow* simply do not demand an approach or result different from that directed by us in *Forsyth I* and followed by the district court on remand. Accordingly, we affirm the district court's denial of absolute immunity and dismiss, as non-appealable, Mitchell's interlocutory appeal of the district court's denial of qualified immunity. Finally, we deny petitioner Mitchell's request for a Writ of Mandamus.

I.

Keith Forsyth ("Plaintiff/Appellee") initiated this action in September, 1972 claiming that former Attorney General John N. Mitchell ("Defendant/Appellant")[1] violated his rights under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 and the First, Fourth, Sixth and Ninth Amendments to the Constitution. The alleged violation stemmed from Mitchell's authorization of a warrantless electronic surveillance in which Forsyth's telephone conversations with William Davidon, a professor at Haverford College and allegedly a member of an organization under investigation, were overheard. Following discovery, the district court denied cross-motions for summary judgment. *Forsyth v. Kleindienst*, 447 F.Supp. 192 (E.D. Pa. 1978). The court also rejected Mitchell's

---

1. Former Attorney General Richard G. Kleindienst and former Acting Director of the Federal Bureau of Investigation ("FBI"), L. Patrick Gray, 3rd, were also named originally as defendants. Plaintiff subsequently admitted that the complaints against them should be dismissed, and the appropriate court order was later entered. Two FBI employees, E. David Porter and Albert Cooper, also had been named defendants in an amendment to Forsyth's original complaint, but they too were dismissed.

claims of absolute immunity and qualified immunity. *Id.* at 198-99, 201.

Mitchell filed a motion for reconsideration and, alternatively, sought certification of the district court's opinion for interlocutory appeal under 28 U.S.C. § 1292(b); he was unsuccessful in both attempts. A notice of appeal was subsequently filed whereupon plaintiff moved to dismiss the appeal because it was interlocutory. This court held that "the denial of defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) collateral order doctrine," but dismissed the defendant's interlocutory appeal from the denial of qualified immunity. *Forsyth I*, 599 F.2d at 1208 (citation added).

On the merits of the appeal in *Forsyth I*, this court rejected Mitchell's argument that "[a]s the head of an executive agency, the Department of Justice, . . . he should not be held liable for what he characterizes as an error in judgment." *Id.* at 1209, 1209-10. We analyzed his absolute immunity claims primarily in the context of *Butz v. Economou*, 438 U.S. 478 (1978) ("*Butz*") and *Imbler v. Pachtman*, 424 U.S. 409 (1976) ("*Imbler*"). We interpreted *Butz* and *Imbler* as providing the shield of absolute immunity only in situations where an official charged with a constitutional violation is engaged in adjudicative or prosecutive functions. Thus, in *Forsyth I*, we held as follows:

> Our reading of *Butz* and *Imbler* leads us to the conclusion that the Attorney General's decision to authorize the warrantless electronic surveillances is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function; however, when the decision arises in the context of a purely investigative or administrative

> function, the decision will not be protected by absolute immunity.

*Forsyth I*, 559 F.2d at 1215.

Accordingly, the case was remanded to the district court to decide the narrow question of whether Mitchell's authorization of the wiretap was closely connected with the judicial process and whether the wiretap was necessary to initiate a criminal prosecution.

On that issue, a hearing was held, but Mitchell failed to present any evidence which would support a quasi-judicial purpose for the surveillance. Indeed, the district court stressed that

> [p]rior to the hearing of January 8, 1982, the government filed a memorandum of law, an affidavit, and several accompanying exhibits. At no time, however, did the government present any evidence, documentary, testimonial, or otherwise, suggesting that defendant Mitchell meant anything other than what was said in his deposition.

*Forsyth v. Kleindienst*, 551 F.Supp. 1247, 1252 (1982).

During his deposition testimony Mitchell revealed the following uncontested facts:

> [T]he Davidon wiretap had an *investigatory* purpose, i.e., to obtain more details about the suspected plot to destroy utility tunnels in Washington, D.C. and to kidnap National Security Council Chairman Henry Kissinger so that the Justice Department, acting through the FBI, might thwart these schemes.

*Id.* (emphasis added). Moreover, Mitchell admitted that he did not know whether a criminal proceeding had been initiated or whether a criminal investigation was pending regarding Davidon or the other alleged utility

tunnel and Kissinger plot members at the time he authorized the wiretaps. The crucial testimony on this issue is quoted below:

> Q. When you received this request [from FBI Director J. Edgar Hoover for authorization for the Davidon wiretap], did it occur to you that the information that could be obtained or would be obtained as a result of this tap could be used in a criminal prosecution?
>
> A. It was not the point of my focus in authorizing the electronic surveillance.
>
> Q. What was the point of your focus?
>
> A. *The gathering of information necessary to protect the national security and to get information on foreign intelligence.*

Volume II Appendix ("II. App.") at 106 (emphasis added); *see also* II. App. at 92-96, 104-06; 123-26; 154-55. Because Mitchell testified, without repudiation, that the wiretap was authorized for national security purposes, not for any prosecutorial quasi-judicial function, the district court took him at his word.

It concluded that "[t]he purpose of the wiretap was prevention -- not prosecution," *Forsyth v. Kleindienst*, 551 F.Supp. at 1252, and that "Attorney General Mitchell was not in any way weighing factors in order to determine whether and whom to prosecute." *Id.* Thus, applying the *Forsyth I* test, which combined the "special function" tests of *Butz* and *Imbler*, the district court held that absolute immunity does not shield Mitchell from liability in the present action. *Id.* at 1253.

The district court also ruled against Mitchell on the issue of qualified immunity. Relying on *Harlow*, 102 S.Ct. 2690 (1982), the district court granted

summmary judgment to the plaintiff because it believed that defendant Mitchell did not meet the test enunciated in *Harlow*. The district court reasoned that because Mitchell failed to establish an objective basis for believing his action to be lawful at the time he authorized the wiretaps in question, the clearly established law made his warrantless wiretapping an unconstitutional violation of plaintiff's rights. *Forsyth v. Kleindienst*, 551 F.Supp. at 1261.

Applying the *Forsyth I* test and the "special functions" approach of *Butz* and *Imbler*, the district court denied defendant Mitchell's claim for absolute immunity. It also denied him qualified immunity and granted plaintiff summary judgment on the issue of liability.

Although the case was set for trial on the issues of damages, the district court declined to certify its decision for interlocutory appeal and denied defendants' Motion for a Stay of Trial pending appeal. *Id.* at 1263-66; Vol. I Appendix ("I. App.") at 37-45. This court granted a stay, allowed the appeal on the absolute immunity issue, and referred the appealability of the qualified immunity issue to the merits panel. *Forsyth v. Kleindienst*, 700 F.2d 104-10 (1983). Mitchell also filed a Petition for Mandamus on the issue of qualified immunity. That petition, No. 83-3150, has been consolidated and referred to this panel for resolution.

## II. Absolute Immunity

We will consider first whether the former Attorney General John N. Mitchell should be absolutely immune from civil liability for permitting the domestic electronic surveillance of Keith Forsyth's telephone conversations with William Davidon without prior judicial authorization. The denial of a claim of absolute immunity is an interlocutory order appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); however,

this is the second time that defendant Mitchell presents this issue to us on interlocutory appeal. The last time, in *Forsyth I*, we enunciated a test and directed the district court to apply that test in deciding whether Mitchell was performing a quasi-judicial function in authorizing the wiretap and therefore entitled to absolute immunity.

Following our directive, the district court correctly applied the test enunciated in *Forsyth I* in denying Mitchell absolute immunity. Mitchell argues now that two recent intervening decisions of the Supreme Court control and make the *Forsyth I* test inappropriate. Mitchell concludes that under *Nixon v. Fitzgerald*, 102 S.Ct. 2690 (1982) and *Harlow & Butterfield v. Fitzgerald*, 102 S.Ct. 2727 (1982) we must find him absolutely immune from civil liability. Mitchell concedes, however, that but for his interpretation in *Nixon* and *Harlow*, the district court's decision -- not having been based on a clearly erroneous finding of fact or misapplication of our directive in *Forsyth I* -- would have to be affirmed. Thus, we must decide whether the Supreme Court's recent decisions of *Nixon* and *Harlow* require us to modify our *Forsyth I* test and the result in this case.

*Nixon* expressly concerned the scope of the former President Richard Nixon's immunity. The finding of absolute immunity for Nixon turned on his former office as President. The Supreme Court held that the former President of the United States is protected by the doctrine of absolute immunity from damages arising from his official acts because of his unique and singular position in our constitutional system. *Nixon*, 102 S.Ct. at 2701. The pertinent language of its holding in *Nixon* is as follows:

> We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the

> separation of powers, and supported by our history.
>
> . . .
>
> The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity.
>
> . . .
>
> In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. E.g., *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895; *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed 2d 90. We find these cases to be inapposite. *The President's unique status under the Constitution distinguishes him from other executive officials.*
>
> *Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.*

*Nixon*, 102 S.Ct. at 2701-03 (emphasis added; footnotes omitted). *See also Harlow*, 102 S.Ct. at 2735.

In carving out a shield of absolute immunity for the former President, the Court continued to apply the standards enunciated in *Butz*, 438 U.S. at 478 and *Imbler*, 424 U.S. at 409. In *Nixon* the Court devoted

several pages of analysis to demonstrating how its holding there was in fact consistent with *Butz* and *Imbler*. The Court distinguished between the President and cabinet officers such as the Attorney General, declaring that the President's "unique status under the Constitution distinguishes him from other executive officials." *Nixon*, 102 S.Ct. at 2702. Consequently, we reject defendant Mitchell's assertion that *Nixon* controls this case and mandates a result different from that reached by the district court.

Having decided that *Nixon* fails to provide Mitchell with an escape from the law of the case and binding effect of *Forsyth I*, we turn to his reliance on *Harlow* for his claim of absolute immunity. Defendant Mitchell uses *Harlow* for support of a "special functions" analysis. In *Harlow*, the Court reiterated its prior recognition "that the judicial, prosecutorial, and legislative functions require absolute immunity." *Harlow*, 102 S.Ct. at 2735. Therefore, the Court declined to grant the undifferentiated extension of absolute immunity to a President's aides. Defendant concedes however in his Motion to Stay Trial pending appeal that a "special functions" argument already has been considered and "*sub silentio* rejected" by this court in *Forsyth I*. Defendant's Motion to Stay Trial at 9.

In *Forsyth I* we considered and interpreted the *Butz* "special functions" approach to provide absolute immunity to an Attorney General engaged in a quasi-judicial function. That approach was reaffirmed by the Supreme Court in *Nixon* and recognized with approval in *Harlow*. *See Harlow*, 102 S.Ct. 2733; *Nixon*, 102 S.Ct. 2700. As Judge Sloviter observed, "[t]he references in *Harlow* to the absolute immunity which might be accorded on the basis of 'special functions' make it clear that the Court did not announce any new law but merely reiterated what it

had previously said in *Butz v. Economou*." *Forsyth v. Kleindienst*, 700 F.2d at 104, 109 (Opinion Sur Grant of Stay) (Sloviter, J., dissenting). Thus, we reject Appellant's argument that *Harlow* requires a result different from that reached by the district court in its application of our *Forsyth I* test.

For these reasons we believe that the district court did not err in denying Mitchell's absolute immunity claim for the unwarranted electronic surveillance of Forsyth's telephone conversation with William Davidon.

## III. Appealability of Summary Denial of Qualified Immunity

Defendant Mitchell appeals also the district court's summary denial of his qualified immunity claim. This interlocutory appeal was previously before us in *Forsyth I* and we found it non-appealable.[2] The Supreme Court denied certiorari, *Forsyth v. Kleindienst*, 453 U.S. 913 (1981), and denied rehearing, 453 U.S. 928 (1981) on *Forsyth I*. As stated earlier, *Forsyth I*, as the law of this court, binds us unless the Supreme Court has mandated otherwise.

Mitchell argues that, at the time of our *Forsyth I* opinion, the doctrine of qualified immunity did not protect a defendant from the burdens of trial, but only from liability. *Forsyth I*, 599 F.2d at 1209. Moreover, Mitchell asserts that *Harlow* has reformulated the qualified immunity doctrine mandating its appealability as a final order within 28 U.S.C. § 1291. Additionally, he relies on *McSurely v. McClellan*, 697

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2. The dissent stresses the fact that this is an old case and that the facts are not disputed; and therefore, we ought put this case to rest now. However, we cannot base the appealability of cases based on the length of time that the parties have been involved in litigation.

F.2d 309, 315-16 (D.C. Cir. 1982) (per curiam) as persuasive support for his argument.

While sharing the concern for protecting government officials from insubstantial claims, we adopt the view of Judge Sloviter "that concern over subjecting government officials to unwarranted claims is best handled through adjustment of the substantive rules of law, as the Supreme Court has recently done, and not by changing the established practice of limiting appellate review of interlocutory decisions." *Forsyth v. Kleindienst*, 700 F.2d at 110 (1983) (Opinion Sur Grant of Stay) (Sloviter, J., dissenting).

Qualified or "good faith" immunity is an affirmative defense which the particular official who seeks to rely on it must plead. The pre-*Harlow* qualified or "good faith" immunity contained both subjective and objective elements. "The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" *Harlow*, 102 S.Ct. at 2737, quoting *Wood v. Strickland*, 420 U.S. 308, 320 (1975). The Court in *Harlow* indicated that the subjective element referred to "permissive intentions" and it reasoned that "[t]he subjective element of the good faith defense frequently has proved incompatible with the [Supreme Court's] admonition in *Butz* [*v. Economou*, 438 U.S. 478)] that insubstantial claims should not proceed to trial." *Harlow*, 102 S.Ct. at 2737. Therefore, in *Harlow*, the Supreme Court dropped the subjective fact-oriented element of qualified immunity and reformulated the doctrine in terms of objective good faith.

Because of *Harlow* a summary judgment motion initiated by a defendant government official can now be granted despite a plaintiff's claim that the government official lacked subjective good faith in his challenged actions. Thus, a government official may avoid insubstantial claims that are based on claims alleging

the absence of subjective good faith. We interpret *Harlow* as encouraging the summary disposition of insubstantial claims brought against government officials, not as relaxing the rule limiting interlocutory appeals.

Moreover, we do not find Mitchell's reliance on *McSurely v. McClellan*, 697 F.2d 309 (D.C.Cir. 1982) (per curiam) persuasive support for allowing an interlocutory appeal of a denial of qualified immunity. *McSurely* holds that "appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity." *Id.* at 316. It emphasized that under *Harlow* "part of the purpose of immunity, whether absolute or qualified, is to shield government officials from 'the risks of trial --distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Id.*, *quoting Harlow v. Fitzgerald*, 102 S.Ct. at 2738. Thus, the *McSurely* court concluded that, under *Harlow*, the Supreme Court "consciously sought to facilitate summary disposition of insubstantial claims against government officials." *Id.*

In the case before us, however, we are without the insubstantial claims which concerned the *Harlow* and *McSurely* courts. The district court here did not defeat a defendant's motion for summary judgment simply because a plaintiff alleged a subjective lack of good faith on the part of a defendant. Instead, the district court relied on the new objective standard enunciated in *Harlow* and found defendant Mitchell liable on summary judgment. Therefore, *Harlow* and *McSurely* are distinguishable from this case.

At this juncture it is again appropriate to quote from Judge Sloviter's dissenting opinion from the

majority's decision to deny the motion to dismiss the appeal of this issue and instead refer consideration of it to the merits panel:

> The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. [We] fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss [would] open the sluices to a flood of interlocutory appeals crushing us even further under a weight of our own making.

*Forsyth v. Kleindienst*, 700 F.2d at 110. (Opinion Sur Grant of Stay)(Sloviter, J., dissenting).

We decline to subject our colleagues to unnecessary additional burdens by opening the sluice gates; thus, mindful of our binding precedent in *Forsyth I* and the large number of state, local, and federal officials that often rely on claims of immunity, we will dismiss defendant's challenge to the district court's denial of his claim to qualified immunity. We will also deny, for the same reasons, defendant's Petition for Writ of Mandamus.

IV.

Accordingly, we will affirm the district court's denial of absolute immunity, dismiss the appeal of the denial of qualified immunity, and deny the Petition for Writ of Mandamus.

WEIS, *Circuit Judge*, dissenting.

I am persuaded that in addition to absolute immunity, the issue of qualified immunity is properly before this court. Determining that the "clearly established" test has not been met, I would find that

defendant meets the requirements for qualified immunity and is entitled to judgment. Accordingly, I dissent.

I

In *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979) (*Forsyth I*), we concluded that denial of summary judgment based on the lack of absolute immunity was appealable under the collateral order doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). In the absolute immunity context, as happens when dismissal on double jeopardy grounds is denied, *Abney v. United States*, 431 U.S. 651 (1977), the right not to be subjected to trial is irretrievably lost if appellate review must await final adjudication on the merits. The order of the district court here, denying absolute immunity and directing that the matter proceed to trial, is final on that issue and is ripe for appellate review. I agree with the majority's ruling on this jurisdictional question because it is consistent with the Supreme Court's treatment of the appeals in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The present appeal raises the defendant's contention that the district court erred in denying not only absolute, but qualified immunity as well. In the earlier appeal, we concluded that the refusal of qualified immunity could not be reviewed on a theory of "tag along" or "pendent" appellate jurisdiction. In *Cohen*-type appeals only claims that fall within the collateral order exception will be entertained. *Abney*, 431 U.S. at 663. Therefore, an order denying qualified immunity must itself meet the jurisdictional requirements of 28 U.S.C. § 1291 (1976).

At the time *Forsyth I* was before us, the qualified immunity defense rested on factors not amenable to pre-trial resolution. *See Wood v. Strickland*, 420 U.S.

308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). We concluded therefore that the denial of summary judgment on that defense was not immediately appealable.

Three years after we decided *Forsyth I*, the Supreme Court reappraised and substantially revised the test for qualified immunity in *Harlow*. 457 U.S. at 815-20. Recognizing that its previous formulation often did not permit pre-trial termination of insubstantial law suits, the Court acknowledged that "an adjustment of the 'good faith' standard" was essential, *id.* at 815, and announced a new test. Under it "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

This objective standard now permits summary judgment for the official if the law was not "clearly established" at the time the challenged action occurred. But even if the right's existence had been settled, courts should grant qualified immunity if the defendant "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819.

In urging that insubstantial claims be determined before trial and even before discovery, the Court itemized costs borne not only by the defendant officials, but by society as well. "[T]he expenses of litigation, the diversion of official energy from pressing public issues,. . . the deterrence of able citizens from acceptance of public office," and the inhibition from "unflinching discharge" of duty were cited as consequences to be avoided. *Id.* at 814, 816-17. The Court also recognized the risks imposed on public officials who must defend their actions before a jury, emphasizing that "in times of political passions,

dishonest or vindictive motives are readily attributed . . . and [are] readily believed." *Id.* at 814 n.23, *quoting Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

In short, avoiding trial through prompt disposition of insubstantial claims by summary judgment is as compelling an objective in cases properly invoking qualified immunity as in those where absolute immunity is available. The *Harlow* Court strongly urged early resolution of non-meritorious law suits that "undermine the effectiveness of government." 457 U.S. at 800-01 n.35.

It follows inexorably that withholding appellate correction of erroneous pre-trial denials of qualified immunity frustrates Harlow's purpose in revising the test. If timely appellate review is not available to redress incorrect preliminary rulings, the right to be relieved of the burdens of trial will, just as in *Abney*, be irretrievably lost. *See also Helstoski v. Meanor*, 442 U.S. 500 (1979). In summarizing *Cohen*'s rationale, Abney explained that "by permitting immediate appeal under those circumstances, this Court made sure that the benefits of the statute were not 'cancelled out.'" 431 U.S. at 662 n.7. The common thread running through *Abney*, *Helstoski*, and *Harlow* is the necessity for early appellate review to prevent subjecting defendants to unnecessary trials.

The Courts of Appeals for the Eighth Circuit and the District of Columbia have similarly concluded that preserving that exemption requires immediate appeal from denial of summary judgment based on qualified immunity. *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982). The *Dillahunty* court, however, properly cautioned that an order withholding qualified immunity is appealable only when the essential facts are not in dispute and the question is a matter of law.

In an unpublished opinion, the Court of Appeals for

the Fourth Circuit in *Benford v. American Broadcasting Co.*, No. 83-1168 (4th Cir. April 11, 1983), *cert. denied, Holton v. Benford*, 52 U.S.L.W. 3263 (1983), refused to entertain an appeal from a denial of summary judgment. In that case, the district court had concluded that the plaintiff's asserted rights had been clearly established at the time of the challenged conduct. I do not find the *Benford* opinion persuasive because in remitting the defendant to trial the court said that "there is no right irretrievably lost to them by this decision." That statement does not adequately heed *Harlow*, or credit its common denominator with *Abney* and *Helstoski* -- the right to be free from unnecessary trial.

The Fourth Circuit's later decision in *Bever v. Gilbertson*, Nos. 83-1790, 83-1791 (4th Cir. Jan. 11, 1984), is readily distinguishable. There, the court declined to take jurisdiction of a qualified immunity appeal because, in addition to damages, the plaintiffs had requested injunctive relief and trial was necessary on that claim whatever the resolution of the immunity question. Without commenting on the merits of that conclusion, I need only note that the Court of Appeals observed that the case was different from one, as here, where the effect of the immunity claim would terminate the litigation. I am persuaded that we focused on the proper standard in *Britton v. Howard Savings Bank*, No. 83-5216 (3d Cir. Jan. 31, 1984), where we said that "the most significant issue with respect to appealability of collateral orders is their effect on parties *pendente lite*, rather than the relationship of issues already decided to the ultimate merits."

I conclude that when no essential facts are in dispute and the question is one of law, the *Abney-Cohen* line of cases establishes jurisdiction for appeals from denials of qualified immunity. *Harlow*'s objectives require no less. Unlike the majority I find that

the denial of qualified immunity in this case presents us with an appealable order.

II

Having determined that this court has jurisdiction for both the qualified and absolute immunity phases, I turn to the merits. Although the majority finds that our earlier decision on absolute immunity is dispositive, I must confess some doubt on that score.

*Harlow*'s discussion of the "special functions" test, as it might apply to the Attorney General in cases implicating national security, lends a force to the defendant's argument here that was lacking in *Forsyth I*. "For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest." *Harlow v. Fitzgerald*, 457 U.S. at 812. This "special functions" notion is different from the prosecutorial role we reviewed in *Forsyth I*. Arguably, it is much more likely that the Attorney General is eligible for special functions consideration than is the Secretary of Agriculture. *Cf. Butz v. Economou*, 438 U.S. 478 (1978). However, because I believe that qualified immunity is applicable here as a matter of law, I do not dwell on the absolute immunity issue.

The qualified immunity question is sharply drawn: was the requirement that the Attorney General of the United States secure judicial authorization for wiretaps undertaken for national security purposes "clearly established" before January 6, 1971.

The various sources to be surveyed in determining the state of the law at the pertinent time have not yet been identified but case law is an obvious beginning point. *See Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Reese v. Nelson*, 598 F.2d 822 (3d Cir. 1979);

*Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir. 1978).

A

The wiretap in the case at bar was removed on January 6, 1971. Not until 1972, one year and five months later, was the right to be free from warrantless governmental surveillance in domestic security cases recognized by the Supreme Court. The resolution of the problem was a sensitive issue requiring careful constitutional analysis and balancing. *See United States v. United States District Court*, 407 U.S. 297, 299 (1972) (*Keith*).

*Keith* observed that electronic surveillance in national security cases had been sanctioned since 1946. *Id.* at 310, & n.10. "Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time." *Id.* at 299.

The inquiry, as the Supreme Court posed it, was "the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. . . . Its resolution is a matter of national concern . . .." *Id.* The Court's opinion could not more clearly define the matter before it for decision.

Plaintiff argues, nevertheless, that the earlier case of *Katz v. United States*, 389 U.S. 347 (1967), "clearly established" his right to be free of searches conducted without prior judicial approval. In *Katz*, the defendant was charged with a gambling offense. His conversation in a telephone booth was intercepted by police officers who had attached a listening and recording device to the outside of the booth. The Court held that the police activity constituted a search requiring prior judicial approval.

It is significant that *Katz* was not a national security case, and the Court did not purport to decide the warrant issue in that context. Indeed, a footnote to the majority opinion disclaimed any such intention. "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case." 389 U.S. at 358 n.23. In a concurring opinion, Justice White, referring to that disavowal, wrote, "in foonote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping." *Id.* at 363. Only Justices Douglas and Brennan took exception to Justice White's statements. *See id.* at 359-60. The Court, referring to the question before it in *Keith*, said: "It addresses a question left open by *Katz*." 407 U.S. at 309. *See also Giordano v. United States*, 394 U.S. 310 (1969). I am convinced that before 1972 the law was not "clearly established" by the Supreme Court.

B

In reviewing other federal court decisions it is interesting that before 1971 the cases had not separated the national security justification for warrantless surveillance into the categories of "domestic" and "foreign" intelligence. As *Keith* observed, both situations were sometimes referred to as "national security" threats. 407 U.S. at 309, n.8. Not until January 8, 1971 -- after the wiretaps in this case had been terminated -- did a district court suggest that different tests might apply in each situation. *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971). In all the reported decisions antedating the surveillance here

-- *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970); *United States v. Butenko*, 318 F. Supp. 66 (D.N.J. 1970); *United States v. Brown*, 317 F. Supp. 531 (E.D. La. 1970); *United States v. Stone*,, 305 F. Supp. 75 (D.D.C. 1969); *United States v. O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969) -- the government advanced foreign intelligence grounds for warrantless electronic surveillance. In each instance, the court found no violation of the Constitution or the Communications Act of 1934, 48 Stat. 1103 (current version at 47 U.S.C. § 605 (1982)).

In two unreported decisions, *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. September 1, 1970), and *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. February 20, 1970), warrantless wiretaps were undertaken by the government on the basis of threats to domestic security. The surveillance was found to be proper in both of those cases. Although these unreported cases do not have the same effect as published opinions, they are relevant.

Thus the Attorney General's decision to authorize the wiretap here was made in an era when the sparse lower federal court case law unanimously supported the theory that no warrant was required in national security cases. These cases provide no support for the plaintiff's theory that the law was "clearly established." If anything, they suggest the opposite -- that settled law held no warrant was required.

Only after the taps here were terminated did a district court hold that electronic surveillance in domestic security cases required judicial authorization. *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971). Two weeks later the rationale of *Smith* was accepted and followed in *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), the case ultimately affirmed by the Supreme Court in *Keith*.

The first occasion for appellate review of whether

the law in this field was "clearly established" arose when some individuals overheard in the *Keith* surveillance sought damages from the Attorney General and others as a result of the taps which the Supreme Court had found to be illegal. In reviewing the grant of summary judgment in favor of the former Attorney General, the Court of Appeals for the District of Columbia concluded that the defendant had not violated "clearly established, authoritatively declared law." *Sinclair v. Kleindienst*, 645 F.2d 1080, 1084 (D.C. Cir. 1981). En route to reaching that result, the Court discussed cases I cited earlier.

Post-*Harlow*, that Court of Appeals again reviewed an Attorney General's entitlement to qualified immunity. *Zweibon v. Mitchell*, 720 F.2d 162 (D.C. Cir. 1983) (*Zweibon IV*). At issue were wiretaps authorized in the period from September 1970 through June 1971. After an exhaustive review of the case law, the court found that the illegality of the defendant's "conduct was not 'clearly established' by any reasonable definition of the phrase." *Id.* at 169. The court dismissed arguments that the *Smith* and *Sinclair* cases, decided by district courts in January 1971, established the state of the law. *Id.* at 171. Also rejected was plaintiff's suggestion that the validity of his position was established by memoranda prepared by the Attorney General's subordinates in 1969 professing some doubt on the constitutionality of national security wiretaps. These memos were characterized as mere predictions of future action by the Supreme Court and discussions of strategic considerations for potential litigation. *Id.* at 170-71.

The same Court of Appeals performed a similar review to determine the state of the law in 1977 with respect to foreign intelligence electronic surveillance. *Chagnon v. Bell*, 642 F.2d 1248 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981). Observing that *Keith* had

not resolved the issue, the court held that liability could not be imposed on the Attorney General "for failure to anticipate legislative reform." *Id.* at 1263. In the circumstances of the times, "the Attorney General was entitled to consider a broad range of options in exercising the wide scope of discretion that his post entails; he was also obligated to act swiftly and firmly at the risk that action deferred [would] be futile or constitute virtual abdication of office." *Id. quoting Scheuer v. Rhodes*, 416 U.S. at 246.

It is also significant that the Court of Appeals for the Ninth Circuit has concluded that the law was not even "clearly foreshadowed" when the Attorney General authorized wiretaps in 1969 and as late as 1972. *Weinberg v. Mitchell*, 588 F.2d 275 (9th Cir. 1978). *Cf. Zweibon v. Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979). As I have observed in the past, the "clearly established" standard requires more definitive explication and certainty than the "foreshadowing" test used in connection with the retroactivity doctrine.[1] *Marino v. Bowers*, 657 F.2d 1363, 1376 n.5 (3d Cir. 1981) (Weis, J., dissenting); *accord Zweibon v. Mitchell*, 720 F.2d 162 (D.C. Cir. 1983) (*Zweibon IV*). Since "clearly foreshadowed" is a lesser test, *Weinberg* is additional support for the proposition that the law was not "clearly established."

C

Contemporaneous statutes do not alter the conclusion that the law was not "clearly established." Court decisions of the period did not suggest that the Attorney General's procedure conflicted with extant statutory law.

*Keith* found that Title III of the Omnibus Crime

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1. The retroactivity of *Keith* is not before us at this time. I therefore have assumed retroactivity *arguendo*.

Control & Safe Streets Act, 18 U.S.C. §§ 2510-2520, authorizing wiretaps under certain conditions, did not resolve the issue in that case. The Court characterized the statute as an "expression of Congressional neutrality" and "not the measure of the executive authority asserted," 407 U.S. at 308. However, the proviso for presidential power, 18 U.S.C. § 2511(3),[2] had led several courts to conclude that wiretaps authorized by the Attorney General for national security purposes did not violate the statute. *See United States v. Clay*, 430 F.2d at 171-72; *United States v. Butenko*, 318 F. Supp. at 73; *United States v. Brown*, 317 F. Supp. at 536-37; *United States v. Dellinger*, No. 69 CR 180, Transcript at 20-21. *See also United States v. Stone*, 305 F. Supp. at 81-82; *United States v. O'Baugh*, 304 F. Supp. at 768 (Attorney General's procedure did not violate § 605 of Communications Act of 1934).[3]

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2. The proviso reads in part:

   "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

3. Legal commentators appear to have been uncertain about the import of the proviso. *Compare Schwartz*, "The Legitimation of Electronic Eavesdropping: The Politics of 'Law and Order,'" 67 MICH. L. REV. 455, 490-94 (1969) (section legitimates president's power); *with* Note, "Eavesdropping at the Government's Discretion -- First Amendment Implications of the National Security Eavesdropping Power," 56 CORNELL L. REV. 161, 162-63 (1970) (does not regulate president's power); *and* Note, "Wiretapping and Electronic Surveillance -- Title III of the Crime Control Act of 1968," 23 RUTGERS L. REV. 319, 334-36 (1969) (Congressional attempt to fill vacuum left by Court in *Katz*; section frees eavesdropping by authority of the President from requirements elsewhere in statute).

Since all of these courts also upheld the constitutionality of the warrantless surveillance, it is reasonable to conclude that Title III was at best neutral, if not in fact Congressional recognition of the President's power to continue to authorize surveillance.

The other statute pertaining to wiretaps, section 605 of the Federal Communications Act of 1934, 48 Stat. 1103, has no relevance here because its scope was limited to prohibiting the use of wiretapped conversations as evidence in court proceedings, a point not presented in the case at hand. *Cf., Nardone v. United States*, 302 U.S. 379 (1937); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950).

D

A survey of law review writings on the subject in 1968-70 is interesting. Although most of the commentators advocated the view that was later adopted in *Keith*, their urging of that approach is in itself a testimonial to the fact that their position was not yet the law.[4]

Thus a review of Supreme Court and other federal court decisions, the statutory provisions, and scholarly commentary all demonstrate that the law of warrantless electronic surveillance in national security

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4. Representative of the many articles written are: Spritzer, "Electronic Surveillance by Leave of the Magistrate: The Case in Opposition," 118 U. PA. L. REV. 169 (1969); Theoharis & Meyer, "The 'National Security' Justification for Electronic Eavesdropping: An Elusive Exception," 14 WAYNE L. REV. 749 (1968); Note, "Wiretapping and Electronic Surveillance -- Title III of the Crime control Act of 1968," 23 RUTGERS L. REV. 319 (1969); Comment, "Privacy and Political Freedom: Application of the Fourth Amendment to 'National Security' Investigations," 17 U.C.L.A. L. REV. 1205 (1970).

cases was only beginning to develop in 1970-71. Unquestionably, a prohibition against warrantless searches in these circumstances was not "clearly established."

III

The majority declines to consider the merits of the qualified immunity defense fearing that allowing a *Abney-Cohen* appeal will open the gates to a flood of interlocutory appeals. As one of those affected by the heavy case load in this court, I am not completely unsympathetic to that approach. However, I am not persuaded that it is the proper one because we must take a broader view of the federal judicial system. Sound judicial administration argues against declining a meritorious appeal when the result is to require a district court to hold a useless trial. We cannot ignore the fact that docket pressures exist in the trial as well as in the appellate courts.

The majority position is particularly regrettable in a case such as this where the question at issue is purely one of law and no discretionary element is present. The state of law in 1971 is a matter of history. The opinions are printed in bound volumes and will not change. The text of the statutes as they existed at that time cannot be varied either now or after trial. All of the material needed to decide the issue is before us and will be no different years from now.

But primarily, we should grant complete review to the legal question here because otherwise we fail to meet the obligation imposed upon us by *Harlow*. The Supreme Court candidly acknowledged that its previous decisions on qualified immunity were incompatible with speedy and inexpensive disposition of non-meritorious cases. To correct that shortcoming, the Court did not hesitate to revise the applicable test. However, that acknowledgment of deficiency and the

effort to put it aright will be all for naught if the courts of appeals fail to exercise jurisdiction in appropriate cases.

This court should not relegate to a later date the inevitable correction of an erroneous district court appraisal of past law. This litigation has lasted far too long. It should be terminated now.

Thirteen years ago plaintiff was overheard three times when he spoke with Davidon on the telephone. Plaintiff concedes that he suffered no pecuniary loss and his freedom of expression was not chilled. The district court has awarded one dollar as nominal damages, and the only claim remaining is for punitive damages. Remand for resolution of this issue will require a possibly lengthy trial, *see Forsyth v. Kleindienst*, 700 F.2d 104, 105-06 (3d Cir. 1983), and cause the precise harm *Harlow* seeks to avoid.

I dissent.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 82-1812

(D.C. Civil No. 72-1920)

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KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, ET AL.,
JOHN N. MITCHELL, APPELLANT

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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[Filed Jan. 20, 1983]

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Before: WEIS, SLOVITER and BECKER, *Circuit Judges.*

### OPINION SUR GRANT OF STAY

WEIS, *Circuit Judge.*

Plaintiff Forsyth has moved to dismiss this appeal as interlocutory, and defendant Mitchell has asked for a stay of trial. We will grant the stay, deny the motion to dismiss the appeal on absolute immunity, and refer the motion to dismiss the appeal on qualified immunity to the merits panel.

Keith Forsyth filed this suit against former Attorney General John Mitchell and others[1] to recover damages for alleged constitutional and statutory violations. Mitchell authorized a warrantless wiretap of one William Davidon in 1970 that resulted in government officials overhearing conversations he had with the plaintiff. The factual allegations underlying the claim are set forth in a previous opinion in

[1] After the notice of appeal was filed, plaintiff dismissed his claims against Albert Cooper and David Porter.

this case. *See Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1205-06 (3d Cir. 1979) (Forsyth I), *cert. denied*, 453 U.S. 912 (1981).

In the earlier appeal, the district court had denied defendant's motion for summary judgment on the basis of absolute immunity. We concluded that the order was appealable because the absolute immunity defense, like that of double jeopardy, *see Abney* v. *United States*, 431 U.S. 651 (1977), protected the right not to be subjected to trial. *See also Nixon* v. *Fitzgerald*, ___ U.S. ___, 50 U.S.L.W. 4797 (June 24, 1982).

On the merits, we held that the "Attorney General's decision to authorize the warrantless electronic surveillances is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function; however, when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity." 599 F.2d at 1215. The district court had held that defendant acted as an administrator rather than an officer of the court, but had "provided us with no statement of the reasons for its decision." *Id.* at 1216. Consequently, we remanded to the district court for further consideration and application of the text we enunciated.

On remand, the district court again denied summary judgment to the defendant, finding that he was not entitled to absolute or qualified immunity. Finding no dispute about the fact that plaintiff had been overheard by virtue of the warrantless wiretap, the court entered summary judgment in favor of the plaintiff and against defendant on liability only. Since the record demonstrated that plaintiff had not suffered any compensatory loss, the case was set for trial on punitive damages only.

The defendant asked the district court for certification of the liability issue under 28 U.S.C. § 1292(b), and a stay pending appeal. Both motions were denied. Defendant has now appealed and seeks a delay of trial until this court has decided the issues he has raised here.

We first address plaintiff's contention that the appeal should be dismissed as interlocutory and frivolous. *Forsyth*

*I* established that a pretrial denial of summary judgment on the basis of absolute immunity is appealable. That precedent is binding on this panel, as is *Nixon* v. *Fitzgerald*. Consequentiy, the denial of summary judgment because of a finding by the district court that there is no absolute immunity presents us with an appealable order. We need not, and do not, decide at this juncture whether the denial of summary judgment on the ground of a lack of qualified immunity is also appealable. We note only that the question is not free from difficulty in the wake of the Supreme Court's pronouncements of the policy underlying the qualified immunity doctrine. *See Harlow* v. *Fitzgerald*, ___ U.S. ___, 50 U.S.L.W. 4815 (June 24, 1982); *McSurely* v. *McClellan*, Slip op. at 1-11 (No. 82-2369) (D.C. Cir. Dec. 10, 1982) (denial of qualified immunity is appealable). That issue will be referred to the merits panel.[2]

As the Supreme Court has made clear, absolute immunity protects the right not to be subjected to trial—a right that is lost if appellate review awaits final adjudication. It follows therefore, that a stay must be granted or the defendant will be deprived of the benefits of adjudication before trial. The fact that the district court granted summary judgment for the plaintiff on liability cannot deprive the defendant of his right to an immediate appeal which accrued on denial of his motion for summary judgment.

The defendant contends that his wiretap authorization had a direct judicial analogue and that *Harlow* raises the availability of a special functions absolute immunity. In the limited time available for the disposition of this motion, we cannot conclude that the appeal from the denial of absolute immunity is frivolous.

Our conclusion is not altered by the fact that only a trial on punitive damages remains in this case. In the present

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[2] The denial of qualified immunity in this case was characterized by the district court as one of law rather than fact. That holding therefore would not be affected by the trial on punitive damages. We note that the district court's adverse ruling on the state of the law in effect at the time the wiretaps were authorized differs from that of the court of appeals in *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084 (D.C. Cir. 1981).

posture of the litigation, it has been determined that the plaintiffs' conversations were overheard on three occasions. Although the plaintiff sustained no loss, in the absence of immunity of the defendant, a judgment for nominal damages would be entered. Only to that extent has there been a liability finding.

There has been no determination, however, as to whether punitive damages may be recovered. To determine this issue there must be inquiry into the circumstances surrounding the defendant's activities, his subjective intent, and the presence or absence of malice. We would expect a thorough examination of the background of the authorization, including possibly a review of what prompted the wiretaps, the advice defendant received from his subordinates, corroborating testimony from those sources, and other similar testimony. If, after that evidence, the fact finder determines that punitive damages are due, then the issue would shift to the proper amount. In connection with this phase of the case, testimony about defendant's financial condition would become relevant.

In sum, the inquiry into the factual issues remaining will not likely be merely a cursory one. Indeed, it may be as searching as the trial on the merits would have been in the absence of summary judgment on liability.

We share the concern of the dissent about the burdens under which this court is operating. However, we are not at liberty to disregard the clear precedent of *Forsyth I* on the appealability of a denial of absolute immunity.

Accordingly, defendant's motion for a stay of proceedings in the district court is granted. The motion to dismiss the appeal from denial of absolute immunity is denied. The plaintiff's motion to dismiss the appeal from the denial of qualified immunity is referred to the merits panel.

TO THE CLERK:

Please file the foregoing opinion.

_____

Circuit Judge

SLOVITER, *Circuit Judge*, dissenting.

I dissent from the denial of the motion to dismiss the appeal and from the grant of a stay.

One of the bedrock principles guiding judicial administration in the federal courts is discouragement of piecemeal appeals. The important purposes served by such a policy were reviewed recently by the Supreme Court: "to emphasiz[e] the deference that apellate courts owe to the trial judge" in order not to "undermine the independence of the district judge"; to "'avoi[d] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment''; and to "promot[e] efficient judicial administration". *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981) (quoting *Cobbledick* v. *United States*, 309 U.S 323, 325 (1940)).

Exceptions to the policy of appellate review of only final orders are few and narrowly construed. In the main, the exceptions are those set forth by Congress in the Judicial Code, *i.e.*, the provision permitting appellate review of orders granting or denying preliminary injunctions, 28 U.S.C. § 1292(a)(1), and the provision permitting appeals of interlocutory orders when certified to involve a controlling question of law as to which there is substantial ground for difference of opinion where an immediate appeal may materially advance the ultimate termination of the litigation, 28 U.S.C. § 1292(b).

In contrast, the other principal exception to review of final orders, the collateral order exception enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is judge-made and covers only a "small class" of orders. A "collateral order" must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 375 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

The policies which underlie the limitation of interlocutory appeallate review are patently applicable in this case.

Plaintiff filed his complaint in September 1972 alleging violation of 18 U.S.C. § 2520 and rights protected under the First, Fourth and Sixth Amendments as the result of the overhearing of his telephone conversations in a warrantless electronic surveillance authorized by defendant, former Attorney General John Mitchell. Following first a stay pending termination of a related criminal matter and then completion of discovery, defendants moved for summary judgment claiming absolute and qualified immunity and plaintiff also moved for summary judgment. The district court denied both summary judgment motions, and this court held that the denial of defendants' motions for summary judgment on the grounds of absolute immunity was appealable immediately under the *Cohen* collateral order doctrine but that the denial of summary judgment on the grounds of qualified immunity could not qualify for immediate review. *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207-09 (3d Cir. 1979) (*Forsyth I*), *cert. denied*, 453 U.S. 913 (1981). The validity of an absolute immunity defense does not easily satisfy the requirement for a *Cohen* collateral order that the issue on appeal must be separate from and collateral to the merits of the action. However, in *Forsyth I* we analogized absolute immunity to a claimed double jeopardy violation held subject to interlocutory review in *Abney* v. *United States*, 431 U.S. 651 (1977). The rationale given in *Abney* was that the rights conferred by the Double Jeopardy Clause, which guarantees against twice being put to trial for the same offense, would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentencing. *Id.* at 660-62. A similar consideration led the Court in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), to hold that a Member of Congress could appeal the district court's denial of a motion to dismiss an indictment alleging violation of the Constitution's Speech or Debate Clause. The Court held that an appeal lay because the Speech or Debate Clause was designed to protect Congressmen not only from the consequences of litigation but also from the burden of defending themselves. *Id.* at 507-08. The common thread running between *Abney* and *Helstoski* is a constitutional right, protected by an ex-

press constitutional provision. The absolute immunity defense afforded representatives of the Executive, albeit not constitutionally based, was deemed in *Forsyth I* to be important enough to warrant the same immediate appeal. We recognized that if former Attorney General Mitchell was correct in his claim that he was entitled to absolute immunity from civil liability for his decision to authorize the warrantless electronic surveillance, his right not to be subjected to trial would be irretrievably lost if appellate review must await final adjudication on the merits.

In considering the merits of Mitchell's claim, we rejected his argument that he was entitled to absolute immunity by virtue of his status as a high official of an executive agency. We relied on the Supreme Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), in holding that heads of federal executive agencies generally have only qualified immunity when violations of federal constitutional law are asserted. However, we also concluded that under the decision in *Imbler* v. *Pachtman, 424 U.S. 409 (1976)*, the Attorney General's decision to authorize the warrantless electronic surveillance is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function but not when the decision arises in the context of a purely investigative or administrative function. We remanded to the district court to determine whether Mitchell was entitled to the defense of absolute immunity under the legal principles we had enunciated in light of the evidence developed. The Supreme Court denied certiorari, 453 U.S. 913 (1981), and denied rehearing, 453 U.S. 928 (1981).

On remand, Mitchell chose to submit no additional testimony. Although given the opportunity by the trial court to present any evidence he wished concerning his purpose in approving the wiretaps, he relied on his previous deposition testimony to oppose plaintiff's motion for summary judgment. The district court reviewed "the uncontested facts" and determined that defendant Mitchell was not engaging in conduct subject to the prosecutorial absolute immunity of *Imbler* v. *Pachtman*. *Forsyth* v. *Kleindienst*, No. 72-1920, slip op. at 9-13 (E.D. Pa. Nov. 12, 1932). The court stressed the deposition testimony by Mitchell who "repeat-

edly stated that the Davidon wiretap had an investigatory purpose, *i.e.*, to obtain more details about the suspected plot to destroy utility tunnels in Washington, D.C. and to kidnap National Security Council Chairman Henry Kissenger so that the Justice Department, acting through the FBI, might thwart these schemes." *Id.* at 9. The district court concluded that "the purpose of the wiretap was prevention—not prosecution" and that Attorney General Mitchell "was not in any way weighing factors in order to determine whether and whom to prosecute." *Id.* The district court also held that defendant Mitchell was not entitled to qualified immunity because at the time of the wiretaps at issue in this case, there was clearly established law that made Mitchell's warrantless electronic surveillance an unconstitutional violation of the plaintiff's rights. *Id.* at 14-28.

The district court took cognizance of the recent Supreme Court decisions of *Nixon* v. *Fitzgerald*, 102 S. Ct. 2690 (1982), and *Harlow* v. *Fitzgerald*, 102 S. Ct. 2727 (1982). It held the *Nixon* decision applied by its terms only to the President and not to cabinet officers, such as the Attorney General. *Id.* at 13-14. The district court also held that Mitchell did not meet the test for qualified immunity formulated in the *Harlow* opinion. Having granted summary judgment to plaintiff on liability, the district court then scheduled the trial on the remaining issue of punitive damages. Thus, more than ten years after filing his complaint, plaintiff still waits for conclusion of the disrict court proceedings.

The majority cites two authorities for denying the motion to dismiss the appeal and according review at this interlocutory stage—our decision in *Forsyth I* and the Supreme Court's recent decision in *Nixon* v. *Fitzgerald*. I believe neither requires this result. Instead, I believe that *Nixon* v. *Fitzgerald* provides persuasive reason to reject this interlocutory review. In that case, the Court considered as a pereliminary matter whether the case had been "in" the Court of Appeals for the District of Columbia Circuit for purposes of Supreme Court certiorari jurisdiction within the meaning of 28 U.S.C. § 1254 (investing the Court with

authority to review "[c]ases in" the courts of appeals). The Court held that "[i]n light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers," former President Nixon did present a "serious and unsettled" and therefore appealable question to the court of appeals. 102 S. Ct. at 2698.

To apply the approach mandated by the Supreme Court in *Nixon* v. *Fitzgerald*, we must first inquire whether defendant Mitchell raises a "serious and unsettled" question as to his right to an absolute immunity defense. Otherwise, under *Nixon* v. *Fitzgerald* the collateral order doctrine is inapplicable. The legal issue of the circumstances under which absolute immunity would be available to defendant Mitchell has already been decided by this court in *Forsyth I*. Significantly, in his papers before us Mitchell does not suggest that the district court either misinterpreted or misapplied our decision in *Forsyth I*. Nor does he suggest that there are any disputed issues of fact. Thus, only if the Supreme Court's recent pronouncements on immunity in *Nixon* v. *Fitzgerald* or *Harlow* v. *Fitzgerald* mandate reversal of our precedent in *Forsyth I*, as defendant Mitchell suggests they do, would there be any basis for interlocutory review on the basis of the collateral order doctrine.

It is apparent from reading those opinions, a task we cannot shirk because of the limited time available for disposition of this motion, that there is no basis for any contention that they change the law on absolute immunity as enunciated in *Forsyth I*. And the district court found, the opinion in *Nixon* v. *Fitzgerald* is by its terms limited to the President. The opinion in *Harlow* v. *Fitzgerald* changes the law only with respect to qualified immunity, not absolute immunity. Indeed, the Court reiterated its earlier decisions in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and *Butz* v. *Economou*, *supra*, that qualified immunity, not absolute immunity, represents the norm.

The majority embraces Mitchell's contention "that *Harlow* raises the availability of a special functions absolute immunity." The references in *Harlow* to the absolute immunity which might be accorded on the basis of "special

functions" make it clear that the Court did not announce any new law but merely reiterated what it had previously said in *Butz* v. *Economou*. Mitchell concedes in his papers before us that he raised the "special functions" argument in *Forsyth I* and that it was *sub silentio* rejected by us. Appellant's Motion to Stay trial at 9. Since *Butz* was considered by this court in *Forsyth I* and the "special functions" immunity which defendant Mitchell tenaciously reiterates was rejected under these facts, I can see no basis for holding that Mitchell raises any "serious and unsettled" question regarding absolute immunity so as to qualify under the collateral order doctrine.

Similarly, I find no precedent in *Forsyth I* for grant of interlocutory review to Mitchell a second time under the collateral order doctrine. When we considered his absolute immunity claim the first time, we had not yet settled the various legal issues presented. That is no longer the case, and the considerations warranting early review there no longer apply.

Furthermore, the posture in which the denial of summary judgment reaches us now is substantially different than it was in *Forsyth I*. Unlike the earlier appeal, the liability phase has been completed since the district court granted summary judgment to the plaintiff on the issue of liability. The only two defenses proffered, that of absolute immunity and that of qualified immunity, have been rejected. While we justified our initial interlocutory review of the denial of summary judgment on the basis of absolute immunity so that defendant would be spared a trial which a favorable disposition on immunity would obviate, we can no longer rely on that ground since Mitchell no longer faces district court proceedings on liability.

Since the liability phase of this case has been concluded, this appeal reaches us in the same posture as that of an appeal from a decision granting plaintiff judgment of liability before damages have been determined, and the nonappealability of those orders is well established. *See, e.g., Catlin* v. *United States*, 324 U.S. 229 (1945); *Western Geophysical Co. of America, Inc.* v. *Bolt Associates, Inc.*, 463 F.2d 101, 102 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972). The

fact that liability was determined on summary judgment as distinguished from a bifurcated trial does not change the general principle that appellate review must await resolution of all of the plaintiff's claim. *See, e.g., Tye* v. *Hertz Drivurself Stations, Inc.*, 173 F.2d 317 (3d Cir. 1949).

The majority suggests that Mitchell is entitled to this second interlocutory appeal from the denial of summary judgment because the remaining trial on punitive damages will entail an inquiry into his activity, his subjective intent, the presence of malice, and his financial condition. Even if the defendant chooses to testify rather than rely on his deposition, once his immunity defense has been rejected he stands in the same posture as any other defendant who seeks immediate appeal from an adverse liability determination in the hope of avoiding the burdensome and sometimes embarrassing inquiry into damages. If we are not prepared to relax the general rule precluding appeals on liability decisions in bifurcated proceedings, I see no reason to relax it here merely because the defendant proffered an absolute immunity defense which has now been rejected by the trial court.

In summary, unlike the majority, I can find no binding precedent for reviewing for a second time the district court's denial of summary judgment on the basis of absolute immunity. The *ratio decidendi* of *Forsyth I* was accomplished when it enunciated the law applicable to an absolute immunity defense, and the district court applied the law to the uncontested facts. Since no new facts have been presented and no new legal principles as to absolute immunity have been enunciated by the Supreme Court, no "serious and unsettled" question is raised.

I am also troubled that the majority chooses to refer to the merits panel that portion of the appeal which is from the denial of summary judgment on the basis of qualified immunity. This court in *Forsyth I*, in an opinion which is binding upon us as precedent, held that the denial of summary judgment on the issue of qualified immunity did not fall within *Cohen*'s collateral order exception to the final judgment rule. 599 F.2d at 1209. While ordinarily a referral to the merits panel of a motion to dismiss an appeal does

not adversely affect a party's rights, in this case that action, combined with the stay of the trial on punitive damages, adds another unjustified delay to the ultimate conclusion of plaintiff's case.

I share what I am sure is the majority's concern that insubstantial claims against present or former government officials should not proceed to trial. *See Harlow* v. *Fitzgerald*, 102 S.Ct. at 2737. Yet one can hardly label plaintiff's claim on which he has been successful on liability in the trial court as "insubstantial". Moreover, I believe that concern over subjecting government officials to unwarranted claims is best handled through adjustment of the substantive rules of law, as the Supreme Court has recently done, and not by changing the established practice of limiting appellate review of interlocutory decisions. Mitchell is not the only defendant to raise the defense of absolute immunity in cases that come before us. Local, state and federal prosecutors do so regularly in cases in which they are named as defendants, and they are entitled to no less favorable treatment than the former Attorney General. Furthermore, if the majority's reference of the qualified immunity issue to the merits panel is to presage a change from our decision in *Forsyth I* that such appeals do not fall within the *Cohen* collateral order doctrine, then we can expect myriad interlocutory appeals from all of the other government officials who are frequently sued.

The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. I fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss will open the sluices to a flood of interlocutory appeals crushing us even further under a weight of our own making.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 82-1812

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KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, ET AL.
JOHN N. MITCHELL, APPELLANT.

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Present: WEIS, SLOVITER and BECKER, *Circuit Judges.*

**ORDER**

And now, to-wit, this 20th day of January, it is

ORDERED that the defendant's motion for a stay is granted, the motion to dismiss the appeal from the denial of absolute immunity is denied. The motion to dismiss the appeal from the denial of qualified immunity is referred to the merits panel.

BY THE COURT,

/s/ Weis
WEISS
Circuit Judge

DATED: JANUARY 20, 1983

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 72-1920

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KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST ET AL.

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[Filed Dec. 3, 1982]

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## MEMORANDUM

BRODERICK, J.

Defendants have filed with this Court a motion requesting the Court to certify for immediate interlocutory appeal its decision of November 12, 1982. For the reasons hereinafter set forth, the Court will deny defendants' motion.

Plaintiff Keith Forsyth ("Forsyth") initiated this action in 1972, seeking to recover damages in connection with the federal government's electronic interception of telephone conversations that he had with Professor William Davidon, the subject of a government wiretap. Plaintiff contends that these interceptions violated his rights under 18 U.S.C. § 2510, *et seq.* (The Omnibus Crime Control Act) and the First, Fourth and Ninth Amendments of the Constitution. Though plaintiff's complaint originally named former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray, he subsequently admitted that the claims against them should be dismissed. On February 14, 1978, the Court entered an order dismissing plaintiff's complaint as to these two defendants. The defendants remaining in this action are former United States Attorney General John Mitchell, who authorized the wiretap at issue, and two employees of the Federal Bureau of Investigation ("FBI"),

who actually intercepted the conversations involving plaintiff.

After discovery was completed, both parties filed cross-motions for summary judgment, which the Court denied in its Memorandum of February 14, 1978 (447 F. Supp. 191 (E.D. Pa. 1978)). The United States Court of Appeals for the Third Circuit under the "collateral order doctrine" heard the appeal on behalf of defendant Mitchell in connection with his claim of absolute immunity but determined that the denial of the motion for summary judgment as to qualified immunity was not appealable. The Third Circuit subsequently remanded this case and that of *Burkhardt* v. *Saxbe*, 448 F. Supp. 588 (E.D. Pa. 1978) "to conduct any additional inquiry that may be necessary" to determine the scope of official immunity of defendant former Attorney General John Mitchell, a defendant in this case. *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979), *cert. denied*, 453 U.S. 913, *reh. denied*, 453 U.S. 928 (1981). Pursuant to the remand, this Court held a hearing and in its Memorandum and Order of November 12, 1982 determined that defendant Mitchell was not entitled to absolute immunity under the standard set forth by the Third Circuit and that factual issues requiring trial remained to be determined in order to determine the liability of the two FBI agents who conducted the wiretapping at issue in this case and to determine the damages suffered by plaintiff Forsyth. The Court also granted summary judgment in favor of the plaintiff as to the liability only of defendant Mitchell based on the recent United States Supreme Court decision of *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982). *Harlow* announced a refinement in the traditional law of qualified immunity as applied to government officials performing discretionary functions. Under the *Harlow* standard, a government official is immune from suit if the law was not clearly established at the time of the official's allegedly wrongful conduct. This Court, in reliance on *Harlow*, determined that such officials are liable in the event they violated clearly established law. The *Harlow* adjustment of official immunity has made irrelevant the subjective good faith of such government officials performing discretionary

acts in a clearly illegal manner. *See* Memorandum of November 12, 1982 at 33-36. *See also Saunders* v. *Parole Agents*, Civil Action No. 81-930 (E.D. Pa. Sept. 30, 1982) (Luongo, Ch. J.); *Druckenmiller* v. *United States*, Civil Action No. 82-0970 (E.D. Pa. Oct. 1, 1982) (Troutman, J.).

Upon reviewing the law of electronic surveillance as it existed in late 1970 and early 1971, the time of the wiretaps at issue in this case, this Court determined that the clearly established law of that time made defendant Mitchell's warrantless electronic surveillance an unconstitutional violation of the plaintiff's rights. *See* Memorandum of November 12, 1982 at 13-28. For that reason, the Court applied *Harlow* to the instant case and granted plaintiff's motion for summary judgment as to the liability only of defendant John Mitchell. The Court denied the remainder of plaintiff's summary judgment motion, denied defendants' summary judgment motion, and set a trial date of December 15, 1982 for the purpose of determining the liability of Albert Cooper and David Porter, the FBI agents who conducted the electronic surveillance at issue in this case, and for the purpose of determining damages suffered by plaintiff Keith Forsyth. The Third Circuit's remand concerned only defendant Mitchell. (599 F.2d 1203).

On November 24, 1982, the defendants filed a motion for certification pursuant to 28 U.S.C. § 1212(b). On December 2, 1982, plaintiff filed a response opposing defendant's motion. For the reasons hereinafter set forth, the Court will enter an order denying the motion.

Title 28, § 1292(b) of the United States Code provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order.

Thus, a district judge is authorized pursuant to § 1292(b) to certify for appeal a nonfinal order that involves a controlling question of law as to which there is substantial ground

for difference of opinion if he believes that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court's Order of November 12, 1982 granting partial summary judgment in favor of the plaintiff as to defendant Mitchell's liability and denying other aspects of the cross-motions for summary judgment is not a final, appealable Order. Section 1292(b), certification for interlocutory appeal, is to be used only in exceptional cases. *See Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) (en banc). The critical issue in each case is whether certification would promote the policies underlying interlocutory appeals, including the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied*, 419 U.S 885 (1974); *McNulty* v. *Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *In re Magic Marker Securities Litigation*, 472 F. Supp. 436 (E.D. Pa. 1979).

Defendants contended that there is substantial ground for difference of opinion as to the effect of *Harlow* v. *Fitzgerald, supra*, on this case. This Court does not agree. Defendants contend that this Court's interpretation of *Harlow* may differ from other court applications of *Harlow*. However, Courts in the Eastern District of Pennsylvania have read *Harlow* as eliminating the subjective good faith components of a qualified immunity defense where the defendant is a government official performing discretionary functions. *See Saunders* v. *Parole Agents, supra; Druckenmiller* v. *United States, supra*. Memorandum of November 12, 1982 at 33-38. The law of electronic surveillance was clearly established in 1970 and this law clearly forbade warrantless wiretapping for national security purposes. *See Katz* v. *United States*, 389 U.S. 347 (1967). In 1972, the United States Supreme Court underscored the clarity of this law by unanimously holding that such warrantless wiretapping was illegal and unconstitutional and that defendant Mitchell's attempted justification for warrantless wiretapping was without any legal justifica-

tion. *See United States* v. *United States District Court (Keith)*, 407 U.S. 297 (1972).

Even if this Court were to accept defendants' argument that there existed a substantial difference of opinion regarding this Court's determination of the applicable law as to defendant Mitchell, the requirements of 28 U.S.C. § 1292(b) would nevertheless remain unsatisfied. Section 1292(b) also requires that, in order to certify an interlocutory question for appeal, the district judge find that an immediate appeal would advance the ultimate termination of the litigation. In this instance, the Court has determined that interlocutory appeal would fail to advance the conclusion of this already 10-year-old case and that an appeal would at this time, once again, delay the ultimate termination of the litigation.

In *Forsyth* v. *Kleindienst* (599 F.2d at 1205), the Third Circuit rejected the contention that the FBI agents were entitled to absolute immunity. Therefore, there is no difference of opinion regarding this Court's determination that the FBI agents are entitled only to a qualified good faith immunity. As the Court noted in its Memorandum of November 12, 1982, the FBI agents are entitled to qualify immunity if they (1) reasonably believed that their actions were not against the law and did not have reason to know that their actions would violate the law; and (2) did not engage in the challenged conduct with a malicious intention to deprive the plaintiff of a constitutional right (at 28). Resolution of the FBI agents' qualified immunity defense is not affected by *Harlow*, the legal standards of which apply only to government officials performing discretionary functions. A determination of the FBI agents' entitlement to qualified immunity thus requires trial and fact-finding. The Court had previously made this same determination in its Memorandum of February 14, 1978, 447 F. Supp. 191, 195 (E.D. Pa. 1978). Thus, it is beyond doubt at this juncture that trial will be required in this matter regardless of whether defendant Mitchell should prevail on any appeal challenging this Court's determination that the plaintiff is entitled to summary judgment as to the liability only of defendant Mitchell. Therefore, an interlocutory appeal raising defend-

ant Mitchell's argument in opposition to this Court's Memorandum of November 12, 1982 would not advance the ultimate termination of this litigation. Such an appeal would once again delay the completion of this case.

As heretofore noted, this action was filed in 1972. Discovery was cumbersome and protracted. It was not until 1977 that this Court received the parties' cross-motions for summary judgment. The Court denied these motions in early 1978. The government sought reconsideration but, while this Court was considering the reconsideration motion, the government appealed to the Third Circuit. After the Third Circuit decision remanded to this Court the question of Attorney General Mitchell's absolute immunity, the government sought certiorari, which was denied in 1981. Thereafter, this Court, accommodating the requests of the government, was not able to hold the hearing required by remand until early 1982. In June 1982, the *Harlow* decision required this Court to further revise its analysis of defendant Mitchell's scope of immunity. This litigation has already been delayed too long. Permitting an interlocutory appeal would not only run contrary to the express language of § 1292(b), but would mean further delay.

Furthermore, defendant Mitchell will not be prejudiced or harmed pendente lite by trial in this matter as to the FBI agents and as to plaintiff's damages. A major policy underpinning the doctrine of official immunity, both absolute and qualified, is a desire to spare high-ranking government officials the time, diversion and expense of discovery and trial. In this case, discovery is completed and Mr. Mitchell need not undergo any proceedings concerning his liability, which has already been determined by this Court as a matter of law pursuant to *Harlow*. A post-trial appeal by defendant Mitchell will serve his legal and financial interests every bit as well as would an interlocutory appeal.

The Court will therefore enter an Order denying the government's motion for certification pursuant to 28 U.S.C. § 1292(b). In connection with that motion, the government has also requested that this Court stay the proceedings in this matter if certification is granted. Since the Court will not certify this case for interlocutory appeal, the govern-

ment's stay request is moot and the Court will deny a stay. The government has also requested a continuance of the trial and hearing date of December 15, 1982. In order to accommodate the scheduling demands of the government's counsel, the Court will grant this request and set a rescheduled trial date of January 14, 1983. An appropriate order accordingly will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 72-1920

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KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, ET AL.

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**ORDER**

AND NOW, this 3rd day of December, 1982, upon consideration of defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) and for a stay, and plaintiff's response thereto, for the reasons set forth in this Court's Memorandum of December 3, 1982,

IT IS HEREBY ORDERED:

1. The Motion for Certification Pursuant to 28 U.S.C. § 1292(b) filed by defendants John Mitchell, Albert Cooper, and David Porter is DENIED;

2. The Motion for a Stay of Proceedings in this matter pending certification for interlocutory appeal is DENIED;

3. Trial in this matter for the purpose of determining the liability of defendants Albert Cooper and David Porter, the FBI agents who conducted the electronic surveillance at issue in this case, and for the purpose of determining damages suffered by plaintiff Keith Forsyth is rescheduled for January 14, 1983 at 9:30 a.m. in Courtroom 10-b of this United States Courthouse, 601 Market Street, Philadelphia, Pennyslvania.

/s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 72-1920

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KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, ET AL

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[Filed Nov. 12, 1982

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## MEMORANDUM

BRODERICK, J.

### I. FACTS AND PROCEDURAL HISTORY OF CASE

Plaintiff Keith Forsyth ("Forsyth") initiated this action in 1972, seeking to recover damages in connection with the federal government's electronic interception of telephone conversations that he had with Professor William Davidon ("Davidon"), the subject of a government wiretap. Plaintiff contends that these interceptions violated his rights under 18 U.S.C. § 2510, *et. seq.* (The Omnibus Crime Control Act) and the First, Fourth and Ninth Amendments of the Constitution. Though plaintiff's complaint originally named former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray, he subsequently admitted that the claims against them should be dismissed. On February 14, 1978, the Court entered an order dismissing plaintiff's complaint as to these two defendants. The defendants remaining in this action are former United States Attorney General John Mitchell, who authorized the wiretap at issue, and two employees of the Federal Bureau of Investigation ("FBI"), who actually intercepted the conversation involving plaintiff.

It is undisputed that the wiretap placed upon Davidon's telephone was warrantless and without court approval. The

electronic surveillance was in effect during December, 1970 and January, 1971. Conversations involving Forsyth were intercepted on three occasions in early December, 1970 and were recorded by the government. None of these interceptions involved conversations between the plaintiff and his attorney. One conversation between Forsyth and Davidon was disclosed in camera to a judge presiding over a criminal proceeding in which Davidon's activities were considered. Other than this disclosure, the government made no use of disclosure of any of Forsyth's intercepted conversations with Davidon. Plaintiff and the defendants have stipulated, regarding plaintiff's private right of action pursuant to the Fourth Amendment, that Forsyth has suffered no pecuniary losses, loss of financial advantages, impairment of reputation, pain and suffering, and has neither been inhibited nor chilled in the exercise of his First Amendment rights as a consequence of being overheard in the course of the warrantless electronic surveillance at issue in this case. (Docket No. 36, filed March 2, 1976).

After discovery was completed, both parties moved for summary judgment. In its Memorandum of February 14, 1978, the Court denied both motions, 447 F. Supp. 192 (E.D. Pa. 1978). The United States Court of Appeals for the Third Circuit subsequently remanded this case and that of *Burkhart* v. *Saxbe*, 448 F. Supp. 588 (E.D. Pa. 1978), "to conduct any additional inquiry that may be necessary and to apply the test [for determining the scope of official immunity to be accorded Attorney General Mitchell] enunciated here." *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981), *reh. denied*, 453 U.S. 928 (1981). The Third Circuit decision otherwise affirmed the factual findings and legal conclusions of this Court. This Court was instructed to determine, however, whether defendant Mitchell should be accorded an absolute immunity from suit in light of the Third Circuit's *Forsyth* test and the seminal Supreme Court cases of *Butz* v. *Economou*, 438 U.S 478 (1978), and *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), or whether he is entitled to only a qualified good faith immunity. Thus, this case was remanded for determination of a narrow question. A hearing

was held in this matter on January 8, 1982. At the hearing, the government submitted an additional affidavit and exhibits and asked this Court to reconsider its earlier denial of the government's summary judgment motion as well as its other legal conclusions adverse to the government. For the reasons hereinafter set forth, the Court determines that former Attorney General Mitchell is not entitled to absolute immunity under the circumstances of this case. The Court will grant plaintiff's motion as to liability only as to John Mitchell.

## II. THE TEST FOR ASSESSING THE SCOPE OF DEFENDANT MITCHELL'S IMMUNITY

In *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), the Third Circuit presented an exhaustive discussion of the state of the law regarding the immunity of federal government officials sued by plaintiffs alleging that the officials had deprived them of a federal constitutional right, 599 F.2d at 1209-17. The Third Circuit stated that under *Imbler* v. *Pachtman*, *supra*, a government attorney possesses absolute immunity from suit for actions taken while he was acting in a prosecutorial capacity but that he possesses only a qualified good faith immunity for his actions as an administrator, investigator, or supervisor of department activities other than specific litigation. The Court recognized, however, that the distinction between these roles may not always be clear. Said the Court:

> This case, dealing essentially with investigative activity, is within the gray area. We recognize that the decision of the Attorney General or a prosecuting attorney is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decision-making and the potential for needless actions. We believe that the *right to make the decision without being subject to suit must include some limited right to gather necessary information.* At the same time, we are sensitive to the possibility that this narrow excep-

> tion could be distorted to include all of a prosecutors' investigative activities. We hold only that *to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself.*
>
> * * *
>
> Our reading of *Butz* and *Imbler* leads us to the conclusion that the Attorney General's decision to authorize the warrantless electronic surveillance is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function [prosecution]; however, *when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity.*

599 F.2d at 1215 (emphasis added and citation omitted).

The government has also urged this Court to consider whether former Attorney General Mitchell, as the ranking Justice Department official empowered, within the executive branch, to approve warrantless national security wiretaps, enjoyed quasi-judicial absolute immunity similar to the judicial absolute immunity of a magistrate or judge approving such wiretaps. The government reasons that defendant Mitchell's role in approving the wiretaps, pursuant to the orders of President Lyndon Johnson, paralleled that of a magistrate (Government pre-hearing brief at 12). However, a close reading of the Third Circuit's opinion in this case indicates that the Third Circuit was well aware that *Butz* v. *Economou* contains language which may be read as creating an absolute immunity for non-judicial branch officials acting in an adjudicatory role. 438 U.S. at 512-15, 599 F.2d at 1210. However, the Circuit Court did not find the instant case to fall within this narrow subset of immunity cases. Rather, the appellate decision focused on the applicable test for determining whether defendant Mitchell was acting within a prosecutorial role and thus entitled to absolute immunity. 599 F.2d at 1211-17.

The instant case was remanded to this Court to determine whether defendant Mitchell met the "prosecutorial" quasi-judicial immunity of *Imbler* and *Butz*, not whether Mitchell might receive the "adjudicatory" quasi-judicial im-

munity mentioned in *Butz* and accorded to Administrative Law Judges. If this Court were to determine this possible basis for immunity, it would conclude that defendant Mitchell was not engaged in a sufficiently adjudicatory role when approving the wiretap at issue. His decisions approving this and other electronic surveillance were merely part of the executive branch's internal procedure for instituting such surveillance. It appears to this Court that this decision-making process was placed in the hands of the Attorney General who, as the Attorney General, has the ultimate responsibility for the operations of the FBI. At the time when the Davidon wiretap was commenced, the District of Columbia was amply supplied with magistrates and judges from whom the Justice Department could have easily sought a warrant for the wiretap, requesting that the record of the proceeding be sealed in the interests of national security. Instead, the executive branch operated its own system of commencing wiretaps apart from the judiciary, with the Attorney General substituting his approval in lieu of a warrant. It would create a dangerous precedent for this Court to approve this procedure in which the Justice Department acted as its own in-house "judicial" oversight. Defendant Mitchell may only receive absolute immunity if he meets the "prosecutorial role" test enunciated by the Third Circuit.

*Imbler* v. *Pachtman* held "only that in initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil suit for damages under [42 U.S.C.] § 1983." 424 U.S. at 431. As the Third Circuit observed, the Supreme Court in *Imbler* "utilized a functional approach. It suggested that even a prosecuting attorney would not be absolutely immune from suit for actions which are not closely connected with the judicial process." 599 F.2d at 1213.

## III. DEFENDANT MITCHELL'S ACTIONS IN THIS CASE

In reviewing the record in this case, the Court must determine whether defendant Mitchell's authorization of the wiretap affecting the plaintiff was "closely connected with the judicial process" and whether it was "necessary to ini-

tiate a criminal prosecution." Based on the record of this case, the Court determines that defendant Mitchell's conduct was not so closely connected or essential to a criminal prosecution to bring him within the "quasi-judicial immunity" discussed in *Imbler* v. *Butz*.

The Court has previously reached this determination in making its first decision as to the cross-motions for summary judgment, (*see* 447 F. Supp. 192, 201) in which Memorandum the Court found that defendant Mitchell was not entitled to absolute immunity because he "was functioning as an administrator rather than as an officer of the court." (447 F. Supp. at 201). Implicit in the Court's ruling was a determination that Mitchell had not been acting to gather information necessary for a criminal prosecution but that he was acting in an investigative capacity so that his activities fell outside the scope of the absolute immunity discussed in *Imbler* v. *Pachtman*, *supra*, a decision that preceded this Court's Memorandum of February 14, 1978. In again reviewing the uncontested facts in deciding the cross-motions for summary judgment pursuant to the Third Circuit's remand, the Court once again determines that defendant Mitchell was not engaging in conduct subject to the prosecutorial absolute immunity of *Imbler* v. *Pachtman*.

In his deposition, defendant Mitchell repeatedly stated that the Davidon wiretap had an investigatory purpose, *i.e.*, to obtain more details about the suspected plot to destroy utility tunnels in Washington, D.C. and to kidnap National Security Council Chairman Henry Kissinger so that the Justice Department, acting through the FBI, might thwart these schemes. The purpose of the wiretap was prevention—not prosecution. Therefore, the information gathering that took place was not "necessary to a prosecutor's decision to initiate a criminal prosecution", 599 F.2d at 1215. It appears, based on this record, that Attorney General Mitchell was not in any way weighing factors in order to determine whether and whom to prosecute. He was already quite aware of the existence of the plots and some of the individuals involved. The Justice Department sought more specific information about the operationalization of the plots so that it might prevent their success. The Justice

Department already had sufficient information to seek an indictment or information against Davidon, Father Phillip Berrigan and Sister Elizabeth McAlister, the three persons who had discussed the possibility of kidnapping Henry Kissenger (*see* 447 F. Supp. at 195). Thus, the Davidon wiretap was not directed at obtaining evidence in order to make a criminal case against these three or any of their associates. *See* depositions of John N. Mitchell: October 23, 1975 at 16-20, 28-32, 48-60 (in *Forsyth* v. *Kleindienst*) and October 14, 1976 (in *Burkhart* v. *Saxbe*) at 6.

Furthermore, Mr. Mitchell himself stated that as Attorney General he was not advised of the initiation of criminal proceedings by the Justice Department and that he did not know if a criminal investigation was pending regarding Davidon or other members involved in the utility tunnel and Kissenger plots. In his deposition of October 23, 1975 at page 30, Mr. Mitchell was asked:

> Q. When you received this request [from FBI Director J. Edgar Hoover for authorization for the Davidon wiretap], did it occur to you that the information that could be obtained or would be obtained as a result of this tap could be used in a criminal proceeding prosecution?
>
> A. It was not the point of my focus in authorizing the electronic surveillance.
>
> Q. What was the point of your focus?
>
> A. The gathering of information necessary to protect the national security and to get information on foreign intelligence.

At no time in the course of this litigation has defendant Mitchell repudiated the aforementioned statements or any other portion of his deposition. After the Third Circuit's remand, this Court set a hearing for the purpose of determining whether the Attorney General authorized the wiretaps in this case for the purpose of obtaining information to initiate a criminal prosecution, or whether defendant Mitchell acted as an investigator and/or administrator (Order of December 1, 1981). Prior to the entry of this Order, several conferences were held in chambers. At these conferences and at the outset of the hearing of January 8, 1982, the Court informed both parties that they could present any

evidence they wished concerning Attorney General Mitchell's purpose in approving the wiretaps. Prior to the hearing of January 8, 1982, the government filed a memorandum of law, an affidavit, and several accompanying exhibits. At no time, however, did the government present any evidence, documentary, testimonial, or otherwise, suggesting that defendant Mitchell meant anything other than what was said in his deposition. The Attorney General stated that he approved the wiretaps as part of a national security investigation. The Court has taken defendant Mitchell at his word.

The government has submitted several exhibits designed to show that there was ample cause to commence criminal prosecution of Prof. Davidon, the Berrigans, and their associates. However, none of these materials address the issue of defendant Mitchell's role in approving the wiretap as issue. If anything, the government's submissions in this regard show that the Davidon wiretap was not necessary for gathering information to commence criminal actions against the Berrigans and their associates but that the Davidon tap could have been installed only for investigative purposes. If Davidon and persons with whom he spoke (*e.g.*, Forsyth) were to be criminally prosecuted, then the electronic surveillance would clearly be outside the purported "national security" exception of the Fourth Amendment's warrant requirement which the government contended existed until this position was flatly rejected by the United States Supreme Court in *United States* v. *United States District Court*, 407 U.S. 297 (1972) (hereinafter cited as *Keith*).

Thus, regardless of whether the Davidon wiretap was motivated by a legitimate national security concern or a good faith belief that there existed a legitimate national security concern, as the defendants contend, or was an invasion of the privacy of political dissidents conducted under the guise of national security, as the plaintiff contends, there is no doubt that defendant Mitchell has consistently taken the position that the Davidon tap "arose in the context of a purely investigative or administrative function" on his part. Applying the test set forth by the Third Circuit, this Court concludes that defendant Mitchell does not have

absolute immunity from suit in this matter but is limited to a good faith immunity.

## IV. RECENT SUPREME COURT DECISIONS AND THE CLARITY OF PLAINTIFF'S CONSTITUTIONAL PROTECTION AGAINST WARRANTLESS ELECTRONIC SURVEILLANCE

Defendant contends that the recent Supreme Court decisions of *Nixon* v. *Fitzgerald*, 102 S.Ct. 2690 (1982) and *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982) require a different result. However, the *Fitzgerald* cases, which concerned the scope of the President's absolute immunity and the scope of a government officer's qualified immunity, do not afford immunity to defendant Mitchell in this case. *Nixon* v. *Fitzgerald* held that a former President of the United States is entitled to absolute immunity from liability for damages predicated upon his official acts (102 S.Ct. at 2701). In reaching this holding, the Court continued to apply a functional test for determining the scope of immunity of government officials as developed in cases such as *Butz* v. *Economou*, 438 U.S. 478 (1978) and *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). *Nixon* v. *Fitzgerald* did not repudiate these cases but took pains to delineate how it was in fact consistent with the court's previous holdings regarding official immunity. *See* 102 S.Ct. at 2699-2702. The court determined that the President's "unique status under the Constitution distinguishes him from other executive officials." (102 S.Ct. at 2702). The court expressly distinguished the President's situation from that of cabinet officers such as the attorney general. *See* 102 S.Ct. at 2702. Thus, the recent *Nixon* v. *Fitzgerald* decision does not bolster the defendant's argument for absolute immunity, an argument which this Court has rejected (pp. 8-11, *supra*).

*Harlow* v. *Fitzgerald* did, however, enunciate a test for the qualified immunity of government officials that may be viewed as more favorable to the defendant. *See* 102 S.Ct. at 2738. However, defendant Mitchell does not meet the test for qualified immunity formulated by Justice Powell in *Harlow*. In *Harlow*, the Court noted that

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees [citing *Butz* v. *Economou*, *supra*, and *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)].

* * *

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of far-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known [citing *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Wood* v. *Strickland*, 420 U.S. 308 (1975)].

* * *

On summary judgment, the judge appropriately may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

* * *

Where an official could be expected to know that certain conduct would violate statutory or constitu-

> tional rights, he should be made to hesitate, and a person who suffers injury caused by such conduct may have a cause of action.

102 S.Ct. at 2738-2739 (footnotes omitted).

Thus, to determine whether defendant Mitchell has established a qualified immunity based upon the status of the applicable law at the time of the wiretap, the Court has examined the applicable case law of warrantless searches as it existed in late 1970 at the time that defendant Mitchell authorized the warrantless wiretap of Professor Davidon. In 1972, the U.S. Supreme Court, in *United States* v. *United States District Court (Keith)*, 407 U.S. 297 (1972) held that electronic surveillance conducted for national security purposes is subject to the general Fourth Amendment law which requires a warrant issued by a judicial officer before the government may tap the phone of one of its citizens (407 U.S. at 320-322). In *Keith*, the Supreme Court applied the teachings of *Katz* v. *Unied States*, 389 U.S. at 347 (1967) to wiretaps conducted in the interests of protecting national security from domestic threats. The Court upheld the general rule of *Katz* against the government's contention that the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et. seq.* provided a grant of power to the President with respect to domestic national security matters. In fact, the Court stated that the law of electronic searches made it clear that electronic surveillance in domestic security matters requires an appropriate prior warrant procedure. The *Keith* majority opinion reached this conclusion with little difficulty because of the clarity of the existing precedents, including the 18th Century opinions of Lord Mansfield (407 U.S. at 316). Said the court:

> Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. [citing *Beck* v. *Ohio*, 379 U.S. 89 (1964)].
>
> * * *
>
> It is true that there have been some exceptions to the warrant requirement [citing cases]. But those exceptions are few in number and carefully delineated [citing Katz], in general they serve the legitimate needs of law enforcement officials to protect their own

> well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' [citing *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *Chimel* v. *California*, 395 U.S. 752, 762, *reh. denied*, 396 U.S. 869 (1969)].

407 U.S. at 318.

The *Keith* opinion clearly states that its holding is no break with the past but rather a logical application of the existing law. For this reason, the District of Columbia Circuit in *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979) *cert. denied*, 453 U.S. 912, *reh. denied*, 453 U.S. 928, *reh. denied*, 453 U.S. 928 (1981) (*Zweibon III*) held that *Keith* was retroactive in effect. Applying the test for retroactive application set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the D.C. Circuit found that *Keith* did not directly overrule past precedent and announced a rule foreshadowed by the Supreme Court's pre-1972 decision such as *Katz* v. *United States*, *supra*. Said the D.C. Circuit:

> Statements by the Supreme Court in the late 1960s certainly demonstrated great concern over unrestrained warrantless wiretapping. Extension of that concern to the national security sphere was certainly likely, though perhaps not inevitable.
>
> * * *
>
> We believe that [*Keith* and other earlier cases] did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations. As a result, we cannot say that the outcome in those cases was not clearly foreshadowed.

606 F.2d at 1178. In *Zweibon III*, the D.C. Circuit also found there was no basis in law for limiting the warrant requirement for domestic national security surveillance to prospective application, holding that such limited application would not be consistent with the purpose and effect of the warrant requirement, the purpose of minimizing government invasion of personal privacy (606 F.2d at 1179-80), and that equitable considerations supported retrospective application of the *Keith* holding (606 F.2d at 1180-81).

Furthermore, the district court decision in *Keith* was entered on January 25, 1971 (321 F. Supp. 1074 (E.D. Mich. 1971)), the culmination of a series of events subsequent to a criminal defendant's motion to compel disclosure of certain electronic surveillance information and determine whether such evidence was unconstitutionally tainted. That motion was filed on October 5, 1970, more than one month prior to the Attorney General's authorizaton of the wiretap at issue in this case. The government responded to the motion on December 18, 1970. Thus, during the time of the Davidon tap (December, 1970 and January, 1971), the Justice Department had reason to know that its position regarding the need for a warrant was subject to both question and attack. After January 25, 1971, the government had overwhelming reason to know that its conduct was unconstitutional. The Eastern District of Michigan's decision was affirmed by the Sixth Circuit (444 F.2d 651 (1971)) and the Supreme Court. Under these circumstances, the *Keith* decision was clearly not a "sharp break in the law."

Though the Ninth Circuit Court of Appeals reached a different conclusion as to retrospective application of the *Keith* holding (*see Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978), this court finds the detailed and well-reasoned opinion of the D.C. Circuit more persuasive than that of the Ninth Circuit. An examination of the *Katz* case supports the D.C. Circuit's view that *Keith* did not tell the Attorney General and other attorneys anything which they should not already have known concerning the Fourth Amendment protections applicable to electronic surveillance.

In *Katz*, the Supreme Court held that wiretaps constituted "search and seizure" within the meaning of the Fourth Amendment and that such surveillance was subject to the Fourth Amendment requirements that such searches be conducted, subject to a few narrow and limited exceptions, pursuant to a search warrant issued by a neutral and detached magistrate or judicial officer. The *Katz* court noted that

> Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes [citing *United States* v.

> *Jeffers*, 342 U.S. 48 (1951)] and that *searches conducted outside the judicial process, without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.*

389 U.S. at 357 (footnotes omitted; emphasis added). The *Katz* court further found that the government, in seeking to obtain evidence regarding Mr. Katz's allegedly illegal gambling, had not met any exception to the requirement of a warrant. In *Katz*, the court declined to give its holding only a prospective effect, even though the issue of whether wiretaps were "searches and seizures" was at least as unsettled as the issue [resolved in *Keith*] as to whether domestic national security wiretaps were subject to less constitutional protection than criminal activity wiretaps.

The concurring opinion of Justice Douglas, joined by Justice Brennan, should have provided particular guidance to defendant Mitchell and all other attorneys regarding the constitutionality of warrantless domestic national security wiretaps. Justice Douglas observed.

> Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved, they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather, it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner [Katz], I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary and prosecutor and disinterested, neutral magistrate.

389 U.S. at 359-360. The Douglas-Brennan concurrence was in part a response to Justice White's concurrence which suggested that the court "should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." 389 U.S. at 363-64.

Thus, in 1967, the *Katz* majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost the gamble in *Keith*. Today, defendant Mitchell asks that this Court conclude that he acted in good faith merely because there exists a general policy in favor of shielding public officials from unmeritorious lawsuits. *Nixon* v. *Fitzgerald* and *Harlow* v. *Fitzgerald* suggest no such result. Defendant Mitchell's disregard for the rights of those whose privacy was invaded becomes all the more incomprehensible in light of the ease with which the government could have sought a warrant for the Davidon tap. There was no need for instantaneous installation of the tap. As heretofore noted, the District of Columbia was well-supplied with judicial officers who could have been approached concerning the electronic surveillance. If such a neutral and detached magistrate were convinced of the existence of probable cause for electronic surveillance, a warrant could have been issued almost immediately.

Furthermore, had the Attorney General believed that national security considerations required immediate electronic surveillance, he could have installed the wiretap and then sought emergency judicial approval of this action pursuant to 18 U.S.C. § 2518(7) (a portion of Title III of the Omnibus Crime Control and Safe Streets Act of 1968). By following the statutory procedure or first approaching a

magistrate or judge with a warrant request and a request for expedited consideration, defendant Mitchell could have pursued the surveillance he contends was necessary to the nation's security interests in a manner consistent with the clear language of the Fourth Amendment, *Katz*, and 18 U.S. § 2510. This, however, was not done by the Attorney General. Instead, he responded to the request of the FBI for the warrantless wiretap.

Furthermore, the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-20 (effective date June 19, 1968).

Title III provides in relevant part that it shall be unlawful to intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication unless such interception is permitted pursuant to Title III. (18 U.S.C. § 2511(a)). Section 2516 of Title 18 sets forth the requirements necessary for obtaining authorization to conduct electronic surveillance. Title 18, § 2517 provides the standards which must be met for disclosure and use of intercepted wire or oral communications; 18 U.S.C. § 2518 sets forth a detailed procedure for obtaining and maintaining warrants to conduct electronic surveillance. Title III (18 U.S.C. § 2511) states that "[e]xcept as specifically provided in this chapter" interception of "any wire or oral communication is illegal." As heretofore noted, however, the Justice Department had contended that 18 U.S.C. § 2511(3) exempted national security investigatory wiretaps from Title III. This section, at the time of the surveillance at issue in this case, provided:

> Nothing contained in this chapter [Title III] or in section 605 of the Communications Act of 1934 * * * *shall limit the constitutional power of the President* to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, *or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to*

> *limit the constitutional power of the President* to take such measures as he deems necessary to protect the United States against overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding *only where such interception was reasonable*, and shall not be otherwise used or disclosed except as is necessary to implement that power.

25 U.S.C. § 2511(3) (1970) (emphasis added).

The government's contention that this segment of Title III countermanded Title III's overall proscription of warrantless wiretaping was rejected by the D.C. Circuit in *Zweibon I* and by this Court in its Memorandum of February 14, 1978 (447 F. Supp. 192). A reading of Title III in its entirety buttresses this determination. Sections 2510-20 of Title 18 of the United States Code comprise a Magna Carta for Americans fearful of excessive government and private eavesdropping. The statute requires that electronic surveillance take place only in accordance with the procedures of the Act, procedures set forth in painstaking detail in 18 U.S.C. § 2518. Throughout the Act, unauthorized "bugging" is condemned. Section 2512 prohibits the "manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices." Section 2513 provides that such devices "may be seized and forefeited to the United States." Section 2515 prohibits, unless specifically authorized by Title III, the "use of evidence of intercepted wire and oral communications ... before any court, grand jury, department, officer, agency, regulatory body, legislative committee, ... state, or a political subdivison thereof...." Section 2520 provides a civil cause of action for damages so that those whose communications are unlawfully intercepted may seek redress and so that the possibility of such private suits will deter unlawful electronic surveillance.

The message of Title III is clear: those who would engage in electronic eavesdropping must comply with Title III or

act at their own peril. The language of Section 2511(3) states only a truism—that the statute does not prohibit the President and his authorized representatives from engaging in constitutional acts. As heretofore noted, pp. 13-23, *supra*, is should have been clear to defendant Mitchell that the type of surveillance utilized in this case was unconstitutional. At the very least, the Attorney General should have entertained serious doubts as to whether or not Section 2511(3) created an exception to the requirements of Title III and the clear overall thrust of the statute. Furthermore, the legislative history of Title III demonstrates that the scope of Section 2511(3) was to be determined by the requirements of the Constitution. *See Zweibon I*, 516 F.2d at 663-65.

In light of the statute (18 U.S.C. § 2510-20), its legislative history, and the clear case law interpreting the warrant requirement of the Fourth Amendment, defendant Mitchell's violation of plaintiff's clearly established legal right is apparent. This misunderstanding of the law is all the more surprising coming from the Attorney General, the chief law enforcement officer of the United States. It was incumbent upon the chief law enforcement officer of the United States in 1970 to be aware of the clearly defined Constitutional and statutory limitations on his authority to approve a warrantless wiretap upon the undisputed circumstances in this case.

As the Supreme Court stated in *Harlow* v. *Fitzgerald*, an official who should have expected to know that his conduct would violate constitutional rights "should be made to hesitate." (102 S.Ct. at 2739). This the defendant, despite his position of authority, power, and trust, did not do. Defendant Mitchell, on the basis of this record, is not entitled to qualified immunity under the standards set forth in *Harlow* v. *Fitzgerald*.

This Court is well aware that the vitality of our federal system is bottomed on the Supreme Court's role in interpreting the Constitution as a living document subject to evolving judicial standards. Throughout the nation's history, litigants have sought to have the Supreme Court interpret the Constitution in ways favorable to their desires.

In this case, the Attorney General was apparently persuaded by his subordinates that the nation's security would better be protected by resorting to electronic surveillance without the encumbrance of a warrant. However, as heretofore noted, the Supreme Court had clearly stated more than three years before the installation of the Davidon wiretap that a warrant was required for such electronic surveillance. Undoubtedly, the Attorney General of the United States has a legal right to seek changes in the Supreme Court's interpretation of the Constitution. But this prerogative does not endow him with the right to ignore what the Supreme Court has previously determined to be a requirement of the Constitution. Under our federal system, this Court is required to interpret the Constitution's requirement of a warrant as declared by the Supreme Court in *Katz*.

## VI. THE IMMUNITY DEFENSE AND SUMMARY JUDGMENT

According to the standards set forth by the Supreme Court, an official enjoying such good faith immunity must assert this immunity as an affirmative defense, which defendant Mitchell has done in this case. To be immune, the official must have (1) reasonably believed that his actions were not against the law and not have had any reason to know that his actions would violate the law; and (2) not have taken the action with malicious intention to deprive the plaintiff of a federal right. *Wood* v. *Strickland*, 420 U.S. 308, *reh. denied*, 421 U.S. 921 (1975); *Procunier* v. *Navarette*, 434 U.S. 555 (1978). In other words, defendant Mitchell was not "immune from liability if he knew or should have known that the action he took would violate the constitutional rights of the plaintiff, or if he took the action with a malicious intention to cause a deprivation." *Forsyth* v. *Kleindienst*, 599 F.2d at 1211, n.7. The Third Circuit has recently stated that "the qualified immunity defense requires the defendant to prove the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief . . . if the

factual representations are properly controverted, qualified immunity must be established as a defense by evidence presented at trial." *Black* v. *Bayer*, 672 F.2d 309, 316 (3d Cir. 1982) (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974).

In a motion for summary judgment, the moving party has the burden of demonstrating that there is no genuine issue of material fact. *See Ettinger* v. *Johnson*, 556 F.2d 692, 696 (3d Cir. 1977); *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F.2d 817, 824 (3d Cir. 1951). In considering a motion for summary judgment, the Court must view the evidence in a light most favorable to the party opposing the motion. *Goodman* v. *Mead Johnson & Company*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

Where cross-motions for summary judgment have been filed, each must be considered separately by the Court. *Rains v. Cascade Industries, Inc.*, 402 F.2d 241 (3d Cir. 1968); C. Wright and A. Miller, *Federal Practice and Procedure* § 2720 at 460-65. Thus, in this case, each party must, in support of its own motion for summary judgment, establish that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. The Court must consider each party's motion on an individual and separate basis determining, in each case, whether a judgment may be entered in accordance with the standards of Rule 56. Both motions must be denied if the Court finds that there is a genuine issue of material fact. *Rains v. Cascade Industries, Inc.*, *supra*. C. Wright and A. Miller, *supra*.

In this case, the parties contest whether the actions of the Attorney General were done with malice toward Forsyth, Davidon, and other political dissidents opposing the Vietnam war. Plaintiff asserts that electronic surveillance of Davidon, a man who posed no clear and present danger to the national security, indicates malice toward the anti-war movement. Plaintiff further contends that the logs of the recorded conversations indicate that the agents made no attempt to cease overhearing conversations outside the

alleged national security purpose of the tap and that this resulted because defendant Mitchell did not so instruct the agents. Defendants contend that they acted only for legitimate reasons with no malice toward the plaintiff. The parties also disagree as to the reasonableness of defendant Mitchell's conduct in failing to seek Court approval of the electronic surveillance, either before or after the installation of the wiretap.

To be sure, more than mere assertions are required to demonstrate the existence of a genuine issue of material fact. A party opposing summary judgment on the ground that there exists such a dispute must respond to an affidavit with more than general denial (*Tunnell v. Wiley*, 514 F.2d 971 (3d Cir. 1975); *Lesnefsky v. Fischer & Porter Co., Inc.*, 527 F. Supp. 951, 954 (E.D. Pa. 1981). The Court should be particularly cognizant of this principle in evaluating the summary judgment motions of government officials, since public policy considerations favor the resolution of non-meritorious claims against such officials without forcing them to undergo the burdens of trial. *Harlow v. Fitzgerald*, 102 S.Ct 2727 (1982). In *Reese v. Nelson*, 598 F.2d 822 (3d Cir.) *cert. denied*, 444 U.S. 970 (1979) the Third Circuit summarized the relevant considerations in ruling on such motions.

> Although as a general proposition, the question of the qualified immunity of a [public] official is a matter for factual resolution, it is clear, the issue need not always be a jury question. In *Procunier v. Navarette*, the Supreme Court affirmed the entry of a summary judgment on the basis of a qualified immunity.
>
> * * *
>
> In evaluting the good faith defense, moreover, it need not be necessary to determine whether the defendants' conduct did in fact violate the plaintiff's constitutional rights or whether the procedures utilized by Lancaster County were constitutionally deficient. As *Navarette* makes clear, the immunity defense should not be rejected if at the time that the act was committed there was no clearly established constitutional right *and* there was no malicious intention to de-

> prive the plaintiff of a constitutional right or cause him other injury.

598 F.2d at 826 (citations omitted; emphasis added). *See also Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 712 (3d Cir.) *cert. denied*, 439 U.S. 966 (1978).

Ordinarily, a dispute of fact such as those found in this case would preclude summary judgment. However, the question in this case has become a legal one. The Third Circuit remanded this case so that this Court could determine the scope of defenadant Mitchell's immunity. As heretofore noted, the record in this case makes it clear that the Attorney General was not acting within his prosecutorial role and thus may benefit only from a qualified immunity. To obtain immunity under the traditional test, Mr. Mitchell must show both that (1) he believed his actions were lawful and he had no reason to know that his actions would violate the law *and* (2) he did not act with malicious intent to deprive plaintiff of a constituional right. As heretofore noted, the Court finds that defendant Mitchell engaged in conduct that he, the chief law enforcement officer of the land, could not have reasonably believed to be lawful. The Court determined that defendant Mitchell should have known that the surveillance at issue in this case required a warrant. Thus, defendant Mitchell has failed to satisfy the first prong of the two-part criteria for qualified immunity as set forth in *Wood v. Strickland* and *Procunier v. Navarette*.

*Harlow v. Fitzgerald* has further refined traditional qualified immunity analysis and underscores the futility of a trial in this case for the purpose of determining the good faith immunity of the Attorney General *Harlow* represented "an adjustment of the 'good faith' standard established by [prior Supreme Court] decisions." 102 S.Ct. at 2737. As Justice Powell observed in *Harlow*,

> Decision of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' [citing Wood v. Strickland]. The subjective component refers to 'permissible intentions.' ... Referring both to the objective and subjective elements, we have held that qualified immunity

> would be defeated if an official *'knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] *or* if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury...." [quoting Wood v. Strickland].

102 S.Ct. at 2737. (citations omitted; emphasis the Court's). The *Harlow* Court then discussed a significant problem with subjective aspects of the test—its tendency to require government officials to defend unmeritorious suits. The Court's adjustment was to direct the federal courts to first make the objective inquiry into the state of the law and determine whether the defendant's conduct violated a clearly established Constitutional right. If the defendant has deprived plaintiff of a clearly established constitutional right, absence of malice would not relieve the defendant of liability, since the defendant violated a clearly established constitutional right.

Said the *Harlow* Court:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred.
>
> If the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct. [T]he defense would turn primarily on objective factors.
>
> * * *
>
> [This] test focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

102 S.Ct. at 2739. *See also Saunders v. Parole Agents*, Civil Action No. 81-930 (E.D. Pa. Sept. 30, 1982) (Luongo, Ch.J.); *Druckenmiller v. United States*, Civil Action No. 82-0970 (E.D. Pa. Oct. 1, 1982) (Troutman, J.).

The mandate of *Harlow* is clear. This Court must interpret the objective law and determine whether defendant Mitchell's conduct violated a clearly established legal right. As heretofore noted, this Court, upon reviewing the decisions of the Supreme Court, has found that in 1970 plaintiff's right to be free of warrantless electronic surveillance, even surveillance conducted pursuant to a national security investigation, was clearly established. Defendant Mitchell, the Attorney General of the United States, should have known that his conduct violated this clearly established legal right and should have refrained from authorizing the wiretap. Thus, according to the objective standard for qualified immunity set forth in *Harlow*, defendant Mitchell is not entitled to the limited immunity of good faith.

In other instances, the question of the reasonableness of a government official's action might require findings of fact by the Court or a jury. In this case, however, the question of reasonableness is a legal question that must be answered by legal research rather than the taking and weighing of testimony. It would be ludicrous to permit a jury or laymen to hear "evidence" about the legal doctrines surrounding the Fourth Amendment and then instruct them that they as laymen are to determine whether the Attorney General's construction of the law was reasonable. The Supreme Court implictly recognized this in *Harlow*. Furthermore, the Court having before it cross-motions for summary judgment, has determined on the basis of the record as it now stands that there is no genuine issue of material fact as to liability. As heretofore pointed out, the Attorney General, in his own deposition, has clearly stated that the warrantless wiretap which he authorized was solely for the purpose of investigating a national security matter and was not intended to obtain evidence necessary for a criminal prosecution.

The Court recognizes that in certain instances a legal defense may require fact-finding for its evaluation. For example, the Supreme Court has enunciated the following narrow exceptions to the warrant requirement of the Fourth Amendment. These are: where the search is incident to a lawful arrest (*Warden v. Hayden*, 387 U.S. 294, 299

(1967)); where the failure to act immediately (even though without a warrant) would endanger the lives of law enforcement personnel or others (*Id.* at 299); where the objects sought in the search are likely to disappear if a warrantless search is not immediately conducted, (*Carroll v. United States*, 267 U.S. 132, 152-54 (1925); *Cooper v. California*, 386 U.S. 58, 59 (1967); *Brinegar v. United States*, 338 U.S. 160, 176-78 (1947)); where law enforcement officers respond to a sudden and unanticipated emergency (*McDonald v. United States*, 335 U.S. 451, 455 (1948); or where a suspect is in flight (*Id.* at 455). These were the few "well-delineated exceptions" to the warrant requirement which the Supreme Court referred to in *Katz v. United States, supra*, 389 U.S. at 357, n.19. A case presenting one of these exceptions might require a trial concerning question of fact. However, defendant Mitchell's defense in this case, although both legal and factual, does not involve a factual dispute. As heretofore noted, defendant Mitchell has maintained throughout this litigation that he approved the warrantless wiretap pursuant to a national security investigation.

Whether plaintiff is entitled to punitive damages and the amount of any such damages is a matter of federal common law. *Bacista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965). Federal common law permits recovery of punitive or exemplary damages where the plaintiff has shown a violation of his civil rights (*Id.* at 87) even if he does not receive an award of compensatory damages (*Cochetti v. Desmond*, 572 F.2d 102, 105 (3d Cir. 1978); *Fisher v. Volz*, 496 F.2d 333, 347-48 (3d Cir. 1974), provided that plaintiff can demonstrate that the defendant "acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so. . . ." *Cochetti v. Desmond, supra*, 572 F.2d at 106. *See also Scott v. Plante*, 641 F.2d 117, 135 (3d Cir. 1981); *Fisher v. Volz, supra*, 496 F.2d at 347. The Court will therefore set a hearing to determine whether the plaintiff is entitled to punitive damages and/or compensatory damages.

As heretofore noted, this case was remanded to this Court by the Third Circuit to determine whether Attorney General Mitchell is entitled to the absolute immunity of a

prosecutor or a qualified immunity. (599 F.2d at 1217). The Third Circuit did not disturb this Court's earlier ruling that there existed genuine issues of material fact which precluded the granting of either motion for summary judgment concerning defendant FBI agents Albert Cooper and David Porter, who conducted the wiretap at issue in this case. (Memorandum of February 14, 1978, 447 F. Supp. 192). Since remand, the parties have not presented any additional facts either by affidavits, answers to interrogatories, or depositions, nor have they presented any reason for the Court to reconsider its earlier ruling concerning the FBI agents. In particular, the parties have not discussed the applicability of *Harlow* to the FBI agents. However, since *Harlow's* holding appears to be limited to "government officials performing discretionary functions" (102 S.Ct. at 2738), it may be that *Harlow* does not alter the two-prong immunity test of *Wood v. Strickland* traditionally applied to FBI agents engaged in ministerial, non-policy-making functions.

It may be that the agents can establish by a preponderance of the evidence that they acted in good faith, on reliance of the Attorney General's authorization of the wiretap, and could thus satisfy the first prong of the two-pronged test for qualified immunity set forth in *Wood v. Strickland* and its progeny.

In any event, here are genuine issues of material fact concerning the conduct of the FBI agents in proceeding with the wiretap and whether they acted with malice, particularly in light of the plaintiff's claim that they failed to minimize the interception and recording of the plaintiff's conversations concerning his political activities. Therefore, trial is required not only on the question of damages, but on the question of liability as to defendants Cooper and Porter.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

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Civil Action
No. 72-1920

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KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, ET. AL.

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**ORDER**

AND NOW, this 12th day of November, 1982, upon consideration of the parties' cross-motions for summary judgment and the parties' respective responses thereto, for the reasons set forth in this Court's Memorandum of November 12, 1982.

IT IS HEREBY ORDERED:

1. Plaintiff Keith Forsyth's motion for summary judgment as to the liability only of defendant John Mitchell is GRANTED;

2. Defendants motion for summary judgment is DENIED;

3. Trial will be held on December 15, 1982 for the purpose of determining the liability of defendants Albert Cooper and David Porter, the FBI agents who conducted the electronic surveillance at issue in this case, and for the purpose of determining damages suffered by plaintiff Keith Forsyth.

/s/ R.J. Broderick, J.

RAYMOND J. BRODERICK, J.

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 82-1812

---

KEITH FROSYTH

*v.*

RICHARD G. KLEINDIENST,
individually and as Attorney General of the
United States, L. Patrick Gray, 3rd, individually
and as Acting Director,
Federal Bureau of Investigation,
JOHN N. MITCHELL, individually and as former
Attorney General of the United States,
JOHN DOE and ALBERT COOPER and DAVID PORTER

JOHN N. MITCHELL, ALBERT COOPER, AND
DAVID PORTER, APPELLANTS

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Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil No. 72-1920)

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No. 83-3150

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KEITH FORSYTH, PLAINTIFF-RESPONDENT

HON. RAYMOND J. BRODERICK,
United States District Judge,
NOMINAL RESPONDENT

*v.*

JOHN N. MITCHELL, DEFENDANT-PETITIONER

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ON PETITION FOR WRIT OF MANDAMUS

Present: WEIS, HIGGINBOTHAM AND SLOVITER, *Circuit Judges*

**JUDGMENT**

These causes came to be heard on the record from the United States District Court for the District of Pennsylvania, were consolidated for disposition, and were argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 12, 1982, be and the same is hereby affirmed with respect to the denial of absolute immunity and dismissed with respect to the denial of qualified immunity.

It is further ordered and adjudged by this Court that the petition for writ of mandamus be, and the same is hereby denied.

Costs taxed against appellants in No. 82-1812 and petitioner in No. 83-3150.

ATTEST:

/s/ Sally Mvros

Clerk

March 8, 1984

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 82-1812

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KEITH FORSYTH, APPELLEE

*v.*

RICHARD G. KLEINDIENST, ET AL., DEFENDANTS,
JOHN N. MITCHELL, APPELLANT.

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Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil No. 72-1920)

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No. 83-3150

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KEITH FORSYTH, PLAINTIFF-RESPONDENT

HON. RAYMOND J. BRODERICK,
United States District Judge,
NOMINAL RESPONDENT

*v.*

JOHN N. MITCHELL, DEFENDANT-PETITIONER

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SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by John N. Mitchell Appellant-Petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Adams would grant rehearing in banc because he believes the issues raised by the appeal are of sufficient importance to command the attention of the full court. Judge Hunter, Judge Weis and Judge Garth would grant the petition for rehearing.

By the Court,

/s/

Circuit Judge

Dated: April 3, 1984

APPENDIX G

# UNITED STATES COURT OF APPEALS
# THIRD CIRCUIT

Nos. 78-1611, 78-1847

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KEITH FORSYTH, APPELLEE

*v.*

RICHARD G. KLEINDIENST, Individually and as Attorney General of the United States, L. PATRICK GRAY, 3rd, Individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE, ALBERT COOPER and DAVID PORTER.

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APPEAL OF JOHN N. MITCHELL, E. DAVIS PORTER, and ALBERT COOPER

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KATHERINE W. BURKHART, JUDITH CHOMSKY, EVA GOLD, DINA PORTNOY, CANDY PUTTER, JOSHUA (JOSH) MARKEL, APPELLEES

*v.*

WILLIAM SAXBE, Individually and as Attorney General of the United States, CLARENCE KELLEY, Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE, and RICHARD ROE

APPEAL OF JOHN N. MITCHELL, CLARENCE KELLEY, and WILLIAM SAXBE

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Argued Feb. 23, 1979

Decided May 22, 1979

Before HUNTER and WEIS, Circuit Judges, and MARKEY, Chief Judge, Court of Customs and Patent Appeals.*

## OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This appeal is a consolidation of two related actions before different district court judges in the Eastern District of Pennsylvania.[1] The actions involve identical issues, virtually identical defendants and have overlapping records. The defendants, former Attorneys General of the United States, a former Director of the Federal Bureau of Investigation, and agents of the Federal Bureau of Investigation, appeal from the denial of their motions for summary judgment. First, the defendants contend that both district courts erred in holding that the defendants are not entitled to absolute immunity. Alternatively, the defendants contend that the district courts erred in not granting them qualified immunity as a matter of law.

We conclude that the district court's denials of defendants' motions for summary judgment on the issue of absolute immunity are appealable at this time under the collateral order doctrine. Both *Forsyth* and

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

[1] *Forsyth* v. *Kleindienst* is reported at 447 F.Supp. 192 (E.D.Pa. 1978). *Burkhart* v. *Saxbe* is found at 448 F.Supp. 588 (E.D.Pa. 1978).

*Burkhart* will be remanded to the respective district court to apply the test developed in this opinion to the facts of each case. On the defendants' contention that they are, in any event, entitled to qualified immunity as a matter of law, we hold that the denial of the motion for summary judgment on this issue is not a final judgment and is, therefore, not appealable at this time. Finally, we reject the individual FBI agents' contention that they are entitled to derivative absolute immunity.

## I.

These cases arise out of warrantless electronic surveillances authorized by the Attorney General and executed by FBI agents in the early 1970's. The wiretaps resulted in the overhearing of telephone conversations between the plaintiffs and members of organizations under investigation. The plaintiffs were not themselves under investigation.

### *Forsyth*

Plaintiff Keith Forsyth was overheard through a tap directed against William Davidon, a professor at Haverford College, who was allegedly associated with the East Coast Conspiracy to Save Lives (ECCSL). The Philadelphia FBI office learned in June, 1970 that the ECCSL was planning to protest the Vietnam War by destroying underground utility tunnels in Washington, D.C. The FBI also had information that the ECCSL had been responsible for several raids on draft board offices. In August, 1970 the government

obtained copies of letters written by Father Phillip Berrigan and Sister Elizabeth McAlister which indicated that three people, including Professor Davidon, had discussed the possibility of kidnapping National Security Advisor Henry Kissinger. On November 6, 1970, after additional investigation, Attorney General John Mitchell authorized the FBI to place a wiretap on the telephone of Professor Davidon. The tap continued with one extension until January 6, 1971. According to FBI Special Agent Fields, the purpose of the tap was primarily to gather intelligence information, although it was anticipated that information of a criminal evidentiary nature might also be obtained. The monitoring agents were instructed to record all conversations unless it was known that one of the parties to the conversation was a defendant in a federal criminal case or was an attorney for a criminal defendant. No other instructions were given to minimize the scope of the interceptions. Forsyth was overheard on three occasions.

Forsyth sued for damages under the first, fourth, sixth, and ninth amendments to the Constitution, and under 18 U.S.C. § 2520 (1976).[2] After discovery, in-

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[2] Section 2520 of Title 18 (1976) provides a private cause of action and damages for violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wire Interception and Interception of Oral Communications). 18 U.S.C. §§ 2510-2520 (1976). It provides:

> Recovery of civil damages authorized
>
> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person

cluding the deposing of defendant Mitchell, both sides moved for summary judgment. On February 14, 1978 the district court denied the motions for summary judgment. First, the court held that the defendants were not entitled to absolute immunity. Second, it held that there was a genuine dispute over material facts which precluded summary judgment on the issue of qualified immunity. *See* Fed.R.Civ.P. 56 (c).

*Burkhart*

Plaintiffs in *Burkhart* were overheard on both the Davidon tap and a tap directed against the Black Panther Party. The Black Panther tap was originally authorized on June 1, 1970 and continued until February 10, 1971. Two reauthorizations in the interim were required because phone service to the Black Panther party headquarters was terminated and the headquarters moved to a new location. Attorney General Mitchell stated in an affidavit that he

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who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recovery from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

authorized the Black Panther tap because he had information that the Party had made foreign "contacts . . . for the purpose of obtaining foreign funds to support Black Panther revolutionary activities, including the advocacy of the violent overthrow of existent Federal and state government structures."

Plaintiffs in *Burkhart* also sued for damages for violations of their rights under the first, fourth, sixth, and ninth amendments to the Constitution, and under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *See* note 2 *supra*. The district court first denied the defendants' claims of absolute immunity in July, 1975. *Burkhart* v. *Saxbe*, 397 F.Supp. 499 (E.D.Pa. 1975). Later cross motions for summary judgment were filed, and argument was heard jointly with that in *Forsyth*. The district court denied both sides' motions for summary judgment on March 21, 1978. As in *Forsyth*, the *Burkhart* court found material questions of fact in dispute which precluded summary judgment on the issue of qualified immunity. Also, it refused to reverse its earlier decision denying the defendants' motion to dismiss on the issue of absolute immunity.

Plaintiffs in both actions rely on *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), (*Keith*), to establish a violation of their fourth amendment rights. There, the Supreme Court held that the fourth amendment requires that a warrant be obtained before engaging in surveillance of a domestic organization, even if the domestic organization threatens national security. In

the context of this case, we have no occasion to review the district courts' holdings that the wiretaps authorized here were unconstitutional under *District Court*. Nor will we address the district courts' holdings that *District Court* is to be given retroactive effect. The sole issue before us is whether the defendants are entitled to absolute immunity.

II.

Initially, we are presented with the plaintiffs' contention that we lack appellate jurisdiction to review the district courts' denials of defendants' motions for summary judgment. Generally, the denial of a motion for summary judgment is not appealable. *Hart* v. *Overseas National Airways, Inc.*, 541 F.2d 386, 394 (3d Cir. 1976). Nevertheless, defendants contend that we have appellate jurisdiction under the final judgment rule, 28 U.S.C. § 1291 (1976).[3] As early as 1949 the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949), emphasized that section 1291 must be given a "practical rather than a technical construction." Under the *Cohen* collateral order doctrine, appellate courts have jurisdiction over orders which "finally determine claims of right separable from, and collateral to, rights as-

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[3] Section 1291 of Title 28 (1976) provides in part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

serted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225-1226. The Supreme Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), summarized the three requirements of *Cohen*.[4] To be appealable a district court's order must 1) conclusively determine the disputed question; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. *Id.* at 468-69, 98 S.Ct. 2454. *See also United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (district court's order denying motion to dismiss indictment because of alleged violation of sixth amendment rights to speedy trial not appealable before trial).

The district courts' denials of the defendants' motions for summary judgment on absolute immunity must be analyzed under these three standards. *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), is closely analogous to our case. There, the Supreme Court addressed the question of whether a pretrial order denying defendants' motion to dismiss on the ground of double jeopardy is a final order under section 1291. In finding appeal-

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[4] In *Livesay* the Court applied the *Cohen* collateral order doctrine to determine that the denial of a motion for class certification is not appealable under 28 U.S.C. § 1291 before trial.

ability, the Court stressed particularly the third of the three *Cohen* factors—that the district court's decision involved an important right which would be lost if appellate review had to await adjudication on the merits. And, in characterizing the right which the defendant would lose absent immediate review, the Court noted: "[The defendant] is contesting the very authority of the Government to hale him into court to face trial on the charge against him. . . The elements of that claim are completely independent of his guilt or innocence." *Id.* at 659-60, 97 S.Ct. at 2040.

We agree with the defendants' argument that the rights protected by the double jeopardy clause and the doctrine of absolute immunity are similar. The underlying purpose of each is to grant the defendant the right not to be subjected to trial, not just the right not to be found guilty. A case quite similar to that before us is *Briggs* v. *Goodwin*, 186 U.S.App. D.C. 179, 569 F.2d 10 (1977) (Wilkey, J. writing for the majority on the issue of appealability), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978). There, the court considered the appealability of the denial of a defendant's motion to dismiss because he was, as a witness in a criminal proceeding, absolutely immune from prosecution under the doctrine of quasi-judicial immunity. In finding appellate jurisdiction the court, also stressing the third of the three *Cohen* criteria, noted that the purpose of absolute immunity is "as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial." *Id.* at 59. The court

interpreted *Abney* as formulating the following test: "whether the relevant rights that were the subject of the pretrial order would be 'significantly undermined' if appellate review had to await final action in the case." *Id. See also McSurely* v. *McClellan*, 172 U.S. App.D.C. 364, 521 F.2d 1024, 1032 (1975), *en banc*, 180 U.S.App.D.C. 101, 553 F.2d 1277 (1976), *cert. dismissed as improvidently granted*, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978) (on appeal from denial of motion to dismiss for absolute immunity under the Speech & Debate Clause, "the question of appealability does not turn on the correctness of an appellant's claim[s]").

Furthermore, defendants here are not precluded from relying on the collateral order doctrine merely because they were unsuccessful in their attempts to have the question of absolute immunity certified under 28 U.S.C. § 1292(b) (1976).[5] A section 1292(b) motion was filed in each action: the motion was denied in *Burkhart* and was not ruled upon in *Forsyth*. Simply stated, the collateral order doctrine and sec-

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[5] Section 1292(b) of Title 28 (1976) provides in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

tion 1292(b) serve different goals. Section 1292(b) permits the district court to certify an order to the appellate court if the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Thus, institutional efficiency is a major purpose of the certification provision. *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) (used in exceptional cases where an intermediate appeal would avoid protracted and expensive litigation). *Accord, Kraus* v. *Board of County Road Commisioners for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966) (purpose to avoid protracted and expensive litigation); *E. F. Hutton & Co.* v. *Brown*, 305 F.Supp. 371, 402-03 (D.C.Tex.1969) (purpose to shorten time, effort, and expense exhausted between filing of lawsuit and its termination). A central goal of the collateral order doctrine, however, is to prevent the loss of rights merely because appellate review is delayed until the litigation has run its full course in the lower court. As noted in *Briggs*, "[s]ince the discretion of the trial judge whether to certify is itself unreviewable, the value of immediate review in the 'small class' of cases where it is warranted under the collateral order doctrine could be irretrievably lost if [the] view that denial of certification *per se* bars interlocutory review were to prevail." 569 F.2d at 60.

We hold that the denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen* collateral order doctrine. Appellate review at this time will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits. *See McSurely* v. *McClellan*, 172 U.S. App.D.C. 364, 521 F.2d 1024 (1975), *en banc*, 180 U.S.App.D.C. 101, 553 F.2d 1277 (1976), *cert. dismissed*, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978).

Finally, we reject the defendants' suggestion that we take this opportunity to review the district courts' denials of their motions for summary judgment on the issue of qualified immunity. The Supreme Court in *Abney*, while upholding appellate jurisdiction over the double jeopardy claim, concluded that an appellate court lacked jurisdiction over the defendant's accompanying contention that the district court erred in refusing to dismiss the indictment for failure to state an offense. The Court held that "such claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule." 431 U.S. at 663, 97 S.Ct. at 2042. Though the defendants may ultimately prevail on

the issue of qualified immunity, they do not seriously contend that the denials of their motions for summary judgment on that issue are appealable under the three requirements of *Cohen*.

## III

We are presented, then, with the defendants' contention that they are entitled to absolute immunity. We recognize, as did the defendants, that the availability of absolute immunity to the individual agents who executed the surveillances may rest on different considerations from those urged by former Attorney General Mitchell.[6] Thus, we analyze the two problems separately.

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[6] We have omitted from our discussion any mention of the defendants who were high level federal officials other than former Attorney General Mitchell. In *Forsyth* the district court dismissed the claims against defendants former Attorney General Richard G. Kleindienst and former Director of the FBI L. Patrick Gray. Plaintiffs have not challenged the dismissal.

In *Burkhart* two of the defendants, former Attorney General William Saxbe and former Director of the FBI Clarence Kelley, have apparently not been formally dismissed. However, neither Saxbe nor Kelley was in office at the time the surveillances occurred. *Burkhart* noted that there is no basis for holding them liable for violating the fourth amendment rights of the plaintiffs. Plaintiffs are left only with a claim against Saxbe and Kelley for illegal use or disclosure of the taped material, an offense arising under 18 U.S.C. § 2520. *See* note 2 *supra*. On these issues, the district court stated: "Defendants, Saxbe and Kelley, having taken office subsequent to the termination of the wiretaps in question and there being no support on the record for plaintiffs' allegations of use and disclosure, I see no basis for holding

Former Attorney General Mitchell contends that he is absolutely immune from civil liability for his decision to authorize the warrantless electronic surveillances. As the head of an executive agency, the Department of Justice, he argues that he should not be held liable for what he characterizes as an error in judgment. His argument stresses that the wiretaps which gave rise to these suits occurred in 1970 and 1971, but that the Supreme Court did not definitely decide until 1972 that the warrantless electronic surveillance of domestic organizations violated the fourth amendment. *See United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). He argues that his only error was a failure to predict accurately what the Supreme Court would later hold. Also, he directs us to the possibility of harassing lawsuits which he contends would hamper the effective discharge of the duties of the Attorney General if we were to hold that he is not entitled to absolute immunity.

The Supreme Court considered the scope of immunity for the heads of federal executive agencies in *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). There, Economou brought suit against a number of officials in the Department of Agriculture. The corporation which the plaintiff controlled, Arthur N. Economou and Co., had been registered with the Department of Agriculture as a

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these defendants liable." 448 F.Supp. at 607 (footnote omitted). Because of their uncertain status, we do not discuss them individually. We note, however, that the principles developed by this opinion would apply equally to them.

commodity futures commission merchant. The Department sought to revoke the registration, contending that the plaintiff had failed to maintain the required financial reserve. A hearing was held, and the Chief Hearing Examiner sustained the administrative complaint. His decision was affirmed by the Department's Judicial Officer. Economou contended that the administrative proceeding had been initiated in retaliation for his sharp criticism of the Commodity Exchange Authority. He sought damages against several officials in the Department of Agriculture—including the Secretary, the Judicial Officer, the Chief Hearing Examiner, and the Department attorney who had presented the Department's objections—for violations of his due process and first amendment rights. The district court granted the defendants' motion to dismiss on the ground of absolute immunity, and the Second Circuit reversed, reasoning that *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), established that officials of the executive branch exercising discretionary functions would be adequately protected by only a qualified immunity.

The Supreme Court reversed. While remanding for further proceedings, the Court held that the Secretary, and the other Agriculture Department officials involved in the administrative proceeding, might be entitled to absolute immunity from suit. The Court first distinguished *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and in the process, cut much of the force out of the Attorney General's argument here. The defendant in *Barr*, the

acting director of an executive agency, claimed absolute immunity from a malicious defamation suit brought by two former employees. The Supreme Court's plurality opinion held that the official was absolutely immune since the issuance of the defamatory press release was "within the outer perimeter of [the defendant's] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." 360 U.S. at 575, 79 S.Ct. at 1341. The Court succinctly stated its rationale for granting absolute immunity:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties —suits which would consume time and energies which would otherwise be devoted to government service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

*Id.* at 571, 79 S.Ct. at 1339. In balancing the deprivation to the individual denied a remedy against the interest of governmental efficiency, the Court recognized that "there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good." *Id.* at 576, 79 S.Ct. at 1342.

The plaintiffs in *Barr* alleged defamation, a cause of action arising under state tort law; in *Butz*, the Court was presented with allegations of constitutional deprivations. This distinction, in the Supreme Court's view, was crucial:

> [W]e are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness embodied in the Constitution. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

98 S.Ct. at 2905 (footnote omitted). Thus, the considerations central to the result in *Barr*—the need to protect an official exercising his discretion and the need to limit harassing suits which would impair the vigorous discharge of his duties—are insufficient to justify the grant of absolute immunity to high officials of executive agencies when violations of federal constitutional law, as opposed to state tort law, are asserted.

Having distinguished *Barr* v. *Matteo*, the Supreme Court looked to *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), to supply the governing legal principles. There it had confronted the scope of immunity available to a state governor sued under 42 U.S.C. § 1983 for suppressing a civil disturbance in an unconstitutional manner. *Butz* characterized *Scheuer* as resolving the problem of "how best to reconcile the plaintiff's right to compensation with the need to protect the decision making processes of an executive department." The result of the balance in *Scheuer* was to grant the state

governor only a qualified, or good faith, immunity from suit.[7] *Butz* extended *Scheuer* to provide the general rule for federal officials as well.[8]

*Butz* and *Scheuer* undermine the Attornel General's policy arguments here. First, he contends that his prediction that warrantless electronic surveillance would not be held to violate the fourth amendment was essentially a discretionary act for which he should not be held liable. We have noted, however, that *Barr's* holding that federal officials exercising discretionary functions are absolutely immune from suit under state tort law does not apply in the face of allegations of constitutional deprivations. The *Butz* Court balanced the competing considerations: "*Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or

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[7] The Supreme Court defined "good faith" for the purposes of establishing qualified immunity from a suit based on § 1983 in *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The Court held that an official would not be immune from liability if he knew or should have known that the action he took would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation. *Id.* at 322, 95 S.Ct. 992.

[8] The *Butz* Court reasoned:

> The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do state officers.

98 S.Ct. at 2908 (emphasis in original).

should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 98 S.Ct. at 2911. More fundamentally, the Attorney General's justification that the law was unsettled when he authorized the warrantless surveillance does not distinguish between absolute and qualified immunity. If he can establish that the law was unsettled, and that he acted without malice, he will prevail on his claim of qualified immunity. *See Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). *See also* note 7 *supra*. As we have stressed, the question before us is not ultimate liability; rather it is whether the Attorney General should be protected even from the burden of defending himself at trial.

Second, the Attorney General contends that he is entitled to absolute immunity because a lesser level of protection would permit an Attorney General to be subject to frivolous, harassing lawsuits which would chill the vigorous discharge of his duties. *Butz*, however, was unconcerned with this problem. The Court noted that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 98 S.Ct. at 2911.

## IV.

The Supreme Court in *Butz* held that "in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 98 S.Ct. at 2911. We read the holding as placing a heavy burden on the defendants to demonstrate a need for protection greater than that provided by qualified immunity.[9] As our starting point we must undertake "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.*, *quoting Imbler* v. *Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976).

In *Imbler* the Supreme Court granted absolute immunity to a state prosecutor from a suit under 42 U.S.C. § 1983 charging him with the knowing use of perjured testimony. The plaintiff contended that the state prosecutor could not, as a member of the executive branch, claim quasi-judicial absolute

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[9] The Court in *Butz* noted:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: . . . In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

98 S.Ct. at 2910-2911.

immunity. The Supreme Court rejected the plaintiff's argument. It stated that its earlier decisions on section 1983 immunities did not rest solely on the branch of government in which the defendant worked. 424 U.S. at 421, 96 S.Ct. 894. After determining that a prosecutor was entitled at common law to absolute immunity from suit, the Court examined the common law rule in light of section 1983. In upholding the grant of absolute immunity, it noted that a state prosecutor would be particularly unable to defend himself from a potential flood of section 1983 suits; that the ultimate fairness of the criminal justice system might be upset by subjecting prosecutors to suit; and that the inherent independence of the judicial system provides procedures to check excessive prosecutorial zeal and determine whether the accused has received a fair trial. 424 U.S. at 425-28, 96 S.Ct. 894.

The Attorney General here relies on *Imbler*. He analogizes his position to that of a state prosecuting attorney, and argues that because their positions are similar, he too should be entitled to the shield of absolute immunity. The Attorney General's claim to absolute immunity, therefore, is measured by that extended to the state prosecutor in *Imbler*. We search, then, for the boundaries to that immunity.

At the outset, the Attorney General cannot effectively contend that his functions are coextensive with those of a prosecuting attorney. Though as a shorthand expression he has been called the nation's "chief prosecuting attorney," his duties and responsibilities are far greater than those of the ordinary prosecu-

tor.[10] The distinction is important because the Supreme Court in *Butz* and *Imbler* intended a functional test rather than one based on status or title.[11] *Butz* particularly stressed the need to make an inquiry into the particular decision challenged to determine whether an official is entitled to absolute immunity. There, the Secretary of Agriculture had the statutory power to initiate proceedings whenever he had reason to believe that a person had violated the statute or the rules, regulations, or orders of the Secretary of Agriculture or the Commission. 7 U.S.C. § 9.[12] The Court noted that "[t]he decision to initiate

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[10] For example, the Attorney General is charged with the duty of giving legal advice to the President, 28 U.S.C. § 511 (1976); to the heads of other executive departments, *id.* at § 512; and to the Secretaries of military departments, *id.* at § 513. His purely administrative duties range from providing for the publication and distribution of his opinions, *id.* at § 521, to appropriating money for the meals and lodging of bailiffs, *id.* at § 524. Moreover, the Federal Bureau of Investigation is within the Department of Justice, *id.* at § 531. And, the Attorney General has the power to appoint officials to detect and prosecute crimes against the United States and to conduct other investigations regarding official matters under the control of the Department of Justice, *id.* at § 533.

[11] The Eighth Circuit in *Tigue* v. *Swaim*, 585 F.2d 909 (8th Cir. 1978), similarly read *Butz* as demanding a functional approach: "*Butz* demands a particularized inquiry into the functions an official performs and the circumstances under which they are performed prior to the granting of absolute immunity," not merely an inquiry into the status or title of the official claiming the protection.

[12] The statute has since been amended to provide that the Commission, and not the Secretary, has the power to initiate proceedings. 7 U.S.C. § 9, *as amended by* Act of Oct. 23, 1974, Pub.L.No. 93-463, 88 Stat. 1392.

administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." 98 S.Ct. at 2915. In granting the Secretary absolute immunity over the decision to institute administrative proceedings, the Court held: "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity *with respect to such acts*." *Id.* (emphasis supplied)[18]

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[18] The Attorney General urges that an important factor in the *Butz* decision to grant absolute immunity against a suit challenging a decision by the Secretary to initiate the administrative proceeding was the existence of checks, other than private damages actions, on the Secretary's conduct. Thus, in *Butz* the Court stressed that "legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal." 98 S.Ct. at 2916. More generally, "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." 98 S.Ct. at 2914. The Attorney General argues that there are sufficient checks on his decision to authorize warrantless electronic wiretaps that he, too, should be immune from private remedy. He points out that the Attorney General is an officer of the court, subject to professional discipline, and that Congress has the power to overturn his judicial interpretations.

We are not necessarily persuaded by the Attorney General's argument. The checks to which he directs our attention are not analogous to the multitude of independent checks and safeguards operating inherently, without the need of special invocation, in the judicial system. It is because of the "features of the judicial process" that "there is a less pressing need for individual suits to correct constitutional error." *Butz*, 98 S.Ct. at 2914. The plaintiffs here were not the sub-

*Imbler* v. *Pachtman*, as well, utilized a functional approach. It suggested that even a prosecuting attorney would not be absolutely immune from suit for actions which are not closely connected with the judicial process. The Supreme Court's holding was narrow: "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." 424 U.S. at 431, 96 S.Ct. at 995. The Court emphasized that the prosecutor's activities "were intimately associated with the judicial phase of the criminal process," and therefore, were "functions to which the reasons for absolute immunity apply with full force." *Id.* at 430, 96 S.Ct. at 995. While leaving open the question of whether a prosecutor is entitled to absolute immunity for other actions, Justice Powell made the following comments:

> We recognize that the duties of the prosecutor in his role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. . . . These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial,

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jects of criminal investigations. If they are denied an opportunity to present their case by the doctrine of absolute immunity the defendants' allegedly unconstitutional conduct may never be subject to judicial scrutiny in any forum.

> may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33.

Cases in other circuits both before and after *Imbler* have distinguished between a prosecutor's quasi-judicial functions on the one hand and his investigative and administrative functions on the other, granting absolute immunity to the former and relegating the latter to qualified immunity. In *Apton* v. *Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974), plaintiffs contended that the Attorney General, other high ranking Department of Justice officials, and members of the District of Columbia Police Department violated their fourth amendment rights. Specifically, plaintiffs complained that they were detained without probable cause during the May Day demonstrations in 1971. The D.C. Circuit held that the Attorney General was not entitled to absolute immunity for his part in directing the May Day police activity. The Court reasoned that "the absolute immunity often accorded prosecuting attorneys cannot shield the defendants in this case, for the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse." *Id.* at 93 (footnotes omitted). The court

held that in the course of directing police investigative activity, the Attorney General would not be entitled to absolute immunity. *See Guerro* v. *Mulhearn*, 498 F.2d 1249 (1st Cir. 1974) (absolute immunity does not relate to acts done in the prosecutor's investigatory role); *Hampton* v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974) (states attorney not absolutely immune for planning and executing illegal raid); *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972); *Dodd* v. *Spokane County, Washington*, 393 F.2d 330, 335 (9th Cir. 1968). *See also Jennings* v. *Shuman*, 567 F.2d 1213, 1221 & n. 15 (3d Cir. 1977), which questions the correctness of the scope of immunity afforded in *Briggs* v. *Goodwin*, 186 U.S.App.D.C. 179, 569 F.2d 10, 19-20 (1977), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978).

This court has not been squarely presented with the problem of the scope of immunity for prosecutorial conduct which lies outside of the advocatory function but within a prosecutor's duties as an administrator or investigator. In *Brawer* v. *Horowitz*, 535 F.2d 830 (3d Cir. 1976), we were confronted with plaintiff's contentions that a federal prosecutor had knowingly used perjured testimony. We held: "[A] federal prosecutor is absolutely immune from suit where the allegations relate solely to his initiating and presenting a criminal case. The allegations of the complaint implicating [the defendant-federal prosecutor] all related to his actions in his role as

an advocate, rather than as an administrator or investigator." *Id.* at 834, *citing Imbler* v. *Pachtman*, 424 U.S. at 431 & n. 33, 96 S.Ct. 984. In *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977), this court in a per curiam opinion considered the immunity available to a federal prosecutor against a suit alleging that he deliberately leaked false information about the plaintiff to damage the plaintiff's political prospects. While finding it unnecessary to decide whether absolute immunity protects a U.S. Attorney's administrative and investigative functions, we held that for some conduct a prosecutor may only be entitled to only qualified immunity: "It would appear that [the deliberate leaking of false information], if it occurred would lie outside of the rationale for absolute immunity set forth in *Imbler*." *Id.* at 566.

Thus, the advocatory/investigative distinction has been cited with approval in this court.[14] We hold that

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[14] Defendants contend that this court rejected the advocatory/investigative distinction in *Cambist Films, Inc.* v. *Duggan*, 475 F.2d 887 (3d Cir. 1973). There, a state prosecuting attorney was sued for his actions in investigating a violation of the laws of Pennsylvania. The court, granting the prosecutor absolute immunity, held: "Obviously, this case in no way approaches the 'clear absence of jurisdiction' standard required for possible liability on the part of the prosecutor." *Id.* at 889. We distinguish *Cambist* on two grounds. First, *Cambist* involved a common law tort action. Any statement on the scope of immunity from allegations of constitutional deprivations is only dicta in that opinion. Second, *Cambist* cites *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965), as defining the distinction between "excess of jurisdiction" and

where the activities of the Attorney General depart from those which cast him in his quasi-judicial role, the protection of absolute immunity will not be available. *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977).

Justice Powell noted in *Imbler* that drawing the line between protected and unprotected conduct will be difficult. 424 U.S. at 431 n. 33, 96 S.Ct. 984. This case, dealing essentially with investigative activity, is within that gray area. We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the potential for needless actions. We believe

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"complete absence of jurisdiction." *Robichaud*, however, stands squarely for the proposition that:

> [W]hen a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws?

351 F.2d at 536. *See also Bauers* v. *Heisel*, 361 F.2d 581, 591 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967).

that the right to make the decision without being subject to suit must include some limited right to gather necessary information. At the same time, we are sensitive to the possibility that this narrow exception could be distorted to include all of a prosecutor's investigative activities. We hold only that to the extent that this securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself.

## V.

Our reading of *Butz* and *Imbler* leads us to the conclusion that the Attorney General's decision to authorize the warrantless electronic surveillances is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function; however, when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity.[15] We foresee that a limited factual inquiry may in some cases be necessary to determine in what role

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[15] In language which may bear on the resolution of this issue, the Supreme Court in *Butz* pointed out:

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime or lawless conduct.

98 S.Ct. at 2910.

the challenged function was exercised. We recognize that this may result in some dilution of the protection of absolute immunity. However, this approach is necessary to protect fully the government official performing a protected function; at the same time, we must permit a private remedy to those whose constitutional rights were violated by an official acting outside the scope of absolute immunity.[16]

In *Forsyth* the district court found that "in authorizing the warrantless wiretap in this case, the Attorney General was functioning as an administrator rather than as an officer of the court," and denied the claim of absolute immunity. 447 F.Supp. at 201. However, the court has provided us with no statement of the reasons for its decision that the authorization of the warrantless wiretaps in this case falls within the Attorney General's administrative function. As we have noted, if the decision to authorize the wiretaps was made by the Attorney General in an attempt to secure information to deter-

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[16] Plaintiffs have also asserted a cause of action under 18 U.S.C. § 2520 (1976) for illegal interception of wire communications. *See* note 2 *supra*. Defendants' claim of absolute immunity for violations of federal statutory law certainly can fare no better than their claim for immunity against constitutional torts.

Moreover, defendants can find no aid in the statute itself. It provides: "A good faith reliance on a . . . legislative authorization shall constitute a complete *defense* to any civil . . . action brought under this chapter. . . ." (emphasis supplied) The greatest scope of protection which the defendants could derive from the words of the statute is a qualified, or good faith, immunity. *See Zweibon* v. *Mitchell*, 170 U.S.App. D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

mine whether to initiate a criminal prosecution, then he is entitled to absolute immunity from suit challenging that decision. Without a statement of the district court's analysis, we are unable to determine whether the Attorney General's conduct meets that test. Therefore, we must remand to the district court for additional consideration. In *Burkhart*, the district court initially ruled on the immunity issue by denying defendants' motion to dismiss or, in the alternative, for judgment on the pleadings. The court found it sufficient that the plaintiffs had made allegations that the Attorney General had authorized the wiretaps in the course of supervising an investigation. 397 F.Supp. at 503 n. 4. Later, on a motion for summary judgment, the district court refused to reconsider its earlier decision denying the motion to dismiss on the ground of absolute immunity. 448 F.Supp. at 608 n. 33. The opinion does not disclose, however, whether the court made any inquiry into the circumstances surrounding the authorization. Therefore, we must remand *Burkhart*, as well, to the district court for an initial determination on the availability of absolute immunity in light of the evidence developed.

VI.

Finally, we must deal with the contention of the individual FBI agents that they are entitled to absolute immunity from suit for conducting the electronic surveillances. They argue that they are entitled to absolute immunity from suit derivatively from the absolute immunity accorded to the Attorney General.

Further, they argue that they were merely following the orders of their superior and should not be put to the test of either disobeying authority or being subject to liability.

Their argument is not persuasive. In *Johnson* v. *Alldredge*, 488 F.2d 820 (3d Cir. 1973), *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974), this court rejected the concept of derivative absolute immunity. There, we held that a prison warden was absolutely immune from suit.[17] However, we granted the prison guards only qualified immunity, even though they were merely implementing the policies formulated by the warden. *Johnson* again demonstrates that a decision on the scope of immunity depends on the functions performed by the particular official. Derivative absolute immunity would be inconsistent with that approach.

*Butz* places a heavy burden on the official claiming absolute immunity to demonstrate "exceptional cir-

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[17] We recognize that the primary holding in *Johnson*, that the prison warden was absolutely immune from suit, may no longer be valid. The prison warden had formulated a prison regulation which was held to violate the constitutional rights of the plaintiff. Relying on *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), we held that the warden was entitled to absolute immunity because the formulation of regulations was a discretionary act and was within the outer perimeter of his duties. As we discussed above, however, *Butz* teaches that the *Barr* v. *Matteo* test does not apply when the official is charged with constitutional violations. Nevertheless, to determine entitlement to absolute immunity, we analyzed the warden and the guards separately under the *Barr* test. Our implicit rejection of derivative absolute immunity survives *Butz*.

cumstances" which would justify such a high level of protection. The agents have made no attempt to bring themselves within the *Butz* test. They do not claim a common law immunity from suit. Indeed, they concede the well established rule that federal law enforcement officers are entitled only to qualified, or good faith, immunity. The special considerations which lead us to grant absolute immunity to a prosecutor's decision to initiate and present a criminal action are simply not present when a federal law enforcement officer is charged with constitutional violations.

Moreover, we wish to emphasize that we have not left the FBI agents defenseless. If they acted in "good faith" in following the instructions of their superiors, then they will prevail. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *see also Wood* v. *Strickland*, 420 U.S. 308, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1975) (defining "good faith" for purpose of qualified immunity). On the other hand, if they knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty.

## VII.

We hold that the Attorney General will be absolutely immune from suit for his decision to authorize the warrantless electronic surveillances only if his decision was made in the performance of a function that is intimately related to the judicial process.

We believe that a determination of the role in which the decision was made may require some inquiry into the circumstances surrounding the decision. As Justice Powell recognized, a prosecutor's quasi-judicial activities are not limited to those which take place in the courtroom. The decision to initiate a criminal prosecution, which we believe includes some limited right to gather information necessary to make that decision, is one such protected function. We are unable to determine from the record whether the district courts in *Forsyth* and *Burkhart* applied the appropriate legal test. Therefore, we must remand both cases to the district courts to conduct any additional inquiry that may be necessary and to apply the test enunciated here. Finally, we hold that the individual FBI agents are not entitled to derivative absolute immunity, and therefore, we will affirm the district courts on that issue.

Each side shall bear its own costs.

APPENDIX H

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

Civ. A. No. 72-1920

KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, Individually and as Attorney General of the United States, L. PATRICK GRAY, 3RD, Individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE

Feb. 14, 1978

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

Plaintiff, Keith Forsyth, initiated this civil action in 1972 to recover damages in connection with the federal government's electronic interception of telephone conversations, which he claims violated his rights under 18 U.S.C. § 2510-2520 and the First, Fourth and Ninth Amendments of the Constitution of the United States.[1] The defendants remaining in

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[1] The plaintiff had originally alleged a violation of his rights under 47 U.S.C. § 605, but now concedes that he has no cause

this action [2] are former Attorney General of the United States John Mitchell, who authorized the wiretap, and two Federal Bureau of Investigation employees, who intercepted the conversations. The plaintiff bases his cause of action upon the undisputed facts that the wiretap placed upon the telephone of William Davidon was warrantless and without court approval, and that during this surveillance, conversations of the plaintiff were overheard and recorded.[3] Discovery in this case has been completed, although at the defendants' request many of the documents and briefs have been filed with the Court *in camera*. Presently before the Court are cross-motions for summary judgment on the issue of liability. Having heard oral argument, we now determine that both these motions will be denied on the ground that there exists a genuine issue of material fact.

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of action thereunder. He has also agreed that the Sixth Amendment claim asserted in the complaint should be dismissed for failure of proof.

[2] In his complaint the plaintiff had included as defendants former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray. He has admitted, however, that his claims against them should be dismissed.

[3] The disclosure of this electronic surveillance was made by the United States in response to an 18 U.S.C. § 2520 motion to suppress filed March 15, 1972, in the then pending criminal action *United States* v. *William Anderson*, Criminal No. 602-71 (D.N.J.).

The defendants claim that they are entitled to summary judgment on the basis of the record for the following reasons:

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 is not applicable to national security electronic surveillances;

2. *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), should not be applied retroactively to give plaintiff a cause of action;

3. The defendants have an absolute immunity in this action for damages; and

4. The defendants' affirmative good faith defense has been established by the record.

On the other hand, the plaintiff contends that he is entitled to summary judgment on the following grounds:

1. The electronic surveillance in question violated Title VIII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, as well as the Fourth Amendment;

2. *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), should be given retroactive application; and

3. The defendants have no absolute immunity and have failed to establish an affirmative defense of good faith.

*Material Facts As To Which There Is No Genuine Issue.*

The pleadings, answers to interrogatories and the deposition of former Attorney General Mitchell filed in this case contain the following material facts as to which there does not appear to be a genuine issue.

In June, 1970, the Philadelphia office of the FBI learned from a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to damage underground heating systems in Washington, D.C. to demonstrate its opposition to the war in Vietnam. At that time the FBI was also informed that ECCSL was responsible for several draft board raids. The FBI began an investigation into these alleged activities.

On August 21, 1970, the same person informed the FBI that at least three people, including Professor William Davidon of Haverford College, had discussed the possibility of kidnapping Henry Kissinger. The Government was furnished with copies of letters in which the idea was considered. These letters were written by two members of ECCSL, Father Phillip Berrigan and Sister Elizabeth McAlister. This information was relayed to the Attorney General, Dr. Kissinger and Presidential Assistant John Ehrlichman in a memorandum by FBI Director J. Edgar Hoover on September 4, 1970. The Philadelphia office of the FBI was assigned primary responsibility for the criminal investigation and was directed to prepare a comprehensive report concerning ECCSL.

On October 12, 1970, the Philadelphia office of the FBI requested the Department of Justice to evaluate the report it had prepared "for a prosecutive opinion." At that time the Philadelphia office was "considering electronic surveillance feasibility for William Davidon." On November 13, 1970, a Department of Justice report concluded that there was a "reasonably good prosecutable case against eleven individuals" with respect to the draft board case, but that there was "not sufficient evidence to obtain a conviction" for the conspiracy to kidnap Dr. Kissinger or to damage the utility system in Washington, D.C.

On November 6, 1970, at the request of the FBI, Attorney General Mitchell authorized the wiretap on Davidon that is the subject of this lawsuit. This tap was placed and continued with one extension, until January 6, 1971. The sworn answers of FBI Special Agent Fields reveal that in the view of the Federal Bureau of Investigation, the electronic surveillance upon which plaintiff's conversations were overheard was instituted for the purpose of gathering intelligence-type information under circumstances where it was also anticipated that information of a criminal evidentiary nature might be obtained. He further stated that under the guidelines which had been issued to FBI field offices concerning electronic surveillance authorized by the Attorney General for national security intelligence gathering purposes, monitoring personnel were instructed to monitor and record conversations unless it was known that a particular individual speaking on the surveilled telephone

line was a defendant in a federal criminal case or an attorney for a defendant in a federal case. With respect to the national security electronic surveillance on which plaintiff's conversations were overheard, neither the subject of that surveillance nor other individuals whose conversations were expected to be overheard were defendants or attorneys for defendants in a federal criminal case, and therefore no particular instructions were given the two FBI employees "to minimize the interception of communications not relevant to the alleged purposes for the interceptions." The plaintiff was overheard on three occasions.

A federal grand jury in Harrisburg, Pennsylvania began hearing evidence on December 13, 1970 regarding a plan to destroy underground utility tunnels in Washington, D.C. and to kidnap Dr. Henry Kissinger. In 1971 true bills were found in connection with two indictments, the prosecution of which became known as the trial of the Harrisburg Eight.

*The Warrantless Electronic Surveillance In This Case Violated The Fourth Amendment.*

Since 1967, when the United States Supreme Court handed down its decision in *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), there has been little doubt that, except for certain well-delineated exceptions,[4] a warrant is necessary for electronic surveillance of criminal activity unre-

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[4] *See, Katz*, 389 U.S. at 357-58, 88 S.Ct. 507.

lated to the national security interest. Furthermore, since 1972 when the Supreme Court decided *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), there has been little doubt that a warrant is also necessary in matters involving the national security interest, except for surveillances based on threats to the national security involving foreign powers.[5] It follows, therefore, that the warrantless electronic surveillance placed on the telephone of William Davidon in November 1970 was unconstitutional. The memorandum by which the Attorney General personally authorized this wiretap claimed that it was necessary to protect the national security interest in connection with the activities of a domestic organization. The Government made no claim that a foreign power was involved. Since *District Court*, there is no question that such a warrantless electronic surveillance is unconstitutional. In this civil action for damages, wherein the plaintiff claims that he was overheard on the warrantless wiretap, the issue presented is whether the plaintiff is entitled to recover monetary damages under either 18 U.S.C. §§ 2510-2520 or the Fourth Amendment.

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[5] *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. (en banc), *cert. denied*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974). *But see, Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

*District Court Should Not Be Given Nonretroactive Application.*

The defendants take the position that no liability on plaintiff's Fourth Amendment claim should be imposed in this civil litigation because under *Chevron Oil* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *District Court* should be given only prospective application.[6] In *Chevron Oil*, the United

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[6] We are not dealing with a criminal case and therefore do not consider Supreme Court decisions in that area. Justice Harlan characterized the Supreme Court's application of the nonretroactivity doctrine in criminal cases in *Desist* v. *United States*, 394 U.S. 244, 256-57, 89 S.Ct. 1030, 1038, 22 L.Ed.2d 248 (1969) (dissenting opinion):

> In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied, *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), we have created an extraordinary collection of rules to govern the application of that principle. We have held that certain 'new' rules are to be applied to all cases then subject to direct review, *Linkletter* v. *Walker*, *supra*; *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller* v. *Alaska*, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968); and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred. *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *De Stefano* v. *Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968).

States Supreme Court set out the criteria for deciding when a decision should be given nonretroactive application in a civil case:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker*, *supra*, 381 U.S. at 629, 85 S.Ct. 1731. Finally, we [must] weigh the inequity, imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by holding of non-retroactivity." *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969). *Id.* at 106-07, 92 S.Ct. at 355.[7]

As to whether *District Court* overruled a "clear past precedent," we find that prior to *District Court*, there was no clear rule of law which would have authorized the warrantless electronic surveillance in the instant case. Thus, *District Court* did not overrule

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[7] For an excellent discussion of this portion of *Chevron Oil*, see Judge Gibbons' analysis in *Kacher* v. *Pittsburgh Nat'l Bank*, 545 F.2d 842, 849-52 (3d Cir. 1976) (dissenting opinion).

any clear past precedent. Whether *District Court* decided "an issue of first impression whose resolution was not clearly foreshadowed" in November 1970 when the wiretap in this case was placed, presents a more difficult question. Prior to the decision in *District Court* in June 1972, several federal courts had been presented with the precise question decided in *District Court*, but they had reached divergent conclusions. On one hand, Judge Hoffman held in *United States* v. *Dellinger*, 69 CR 180 at 20 (N.D.Ill. Feb. 20, 1970):

> because the matter of when electronic surveillance is reasonably necessary to investigations carried out to protect the national security is a matter not suitable for a judicial determination, but is rather best left to the authorization of the President or his chief legal officer, the Attorney General, I conclude that *electronic surveillance in national security cases is not subject to the warrant requirements* of the Fourth Amendment. (emphasis added).

And Chief Judge Stanley of the District of Kansas stated on the record in *United States* v. *O'Neal*, KC-CR-1204 on September 1, 1970:

> all of the [warrantless] interceptions, the wiretaps, in this case, . . . *were legally obtained within the inherent constitutional power of the President* because of his responsibility to gather intelligence information having to do with matters vital to national security . . . (emphasis added).

On the other hand, Judge Ferguson stated in *United States* v. *Smith*, 321 F.Supp. 424, 429 (C.D.

Cal. 1971), on January 8, 1971, just two days after the Davidon tap was removed:

> [t]his court is forced to conclude that in wholly domestic situations *there is no national security exemption from the warrant requirement* of the Fourth Amendment. (emphasis added).

Shortly thereafter, the district court judge in *District Court* stated in response to the Government's claim that the President, acting through the Attorney General, is clothed with the power to authorize warrantless wiretaps for domestic security purposes:

> [i]n the opinion of this Court, the position of the Attorney General is untenable. *It is supported neither historically, nor by the language of the Omnibus Crime Act.* Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today. *United States* v. *Sinclair*, 321 F.Supp. 1074, 1079 (D.Mich.1971), *aff'd sub nom. United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (emphasis added).

The most relevant Supreme Court case prior to *District Court* was *Katz*, wherein the Court made it clear that a warrant was necessary for all types (even nontrespassory) of electronic surveillance of criminal activity unrelated to the national security interest. In *Katz*, Justice Stewart stated in the majority opinion:

> [w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth

> Amendment in a situation involving the national security is a question not presented by this case. 389 U.S. at 359 n. 23, 88 S.Ct. at 515.

Although six other Justices agreed with the decision of the Court, three felt compelled to write concurring opinions in order to express their views on this issue. Justice White wrote:

> [w]e should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, has considered the requirements of national security and authorized electronic surveillance as reasonable. *Id.* at 364, 88 S.Ct. at 518.

Justice Douglas, with Justice Brennan joining, wrote:

> [n]either the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, [we] cannot agree that where spies and saboteurs are

> involved adequate protection of the Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate. *Id.* at 359-60, 88 S.Ct. at 516.

In view of our determination in connection with the second and third criteria for nonretroactivity, we do not find it necessary to decide the question of whether *District Court* decided "an issue of first impression whose resolution was not clearly foreshadowed" in 1970.[8]

The second criterion for nonretroactivity set forth in *Chevron Oil* is whether application will further or retard the purpose of the ruling. The purpose of the rule enunciated in *District Court* was to protect people from unwarranted intrusions into their privacy by the administrative arm of their government. Denying nonretroactivity will not retard, but should encourage vigilance and solicitude for the Fourth Amendment rights of persons, particularly in close cases.

The third and final criterion for nonretroactivity in *Chevron Oil* is whether there will be injustice or hardship to the parties. In this case, as we hereinafter determine, the defendants will be afforded an opportunity to establish a good faith defense. Obvi-

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[8] The use of warrantless electronic surveillance by previous Presidents and Attorneys General is discussed in *District Court, supra*, 407 U.S. at 310, 92 S.Ct. 2125 and in *Zweibon*, 170 U.S.App.D.C. at 23, 516 F.2d at 616.

ously, retroactive application is not inequitable to the plaintiff. Thus, none of the parties will suffer an unjust hardship if *District Court* is retroactively applied. In view of our determination that the second and third criteria of *Chevron Oil* have not been met, we conclude that the record in this civil case does not support a holding of nonretroactivity pursuant to *Chevron Oil*.[9]

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[9] Nonretroactive application of new Fourth Amendment doctrines is frequently mandated in criminal cases. *See, e.g., Desist* v. *United States*, 394 U.S. 244, 247-48, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). Nevertheless, *District Court* was not given nonretroactive application when the electronic surveillance at issue in this case was challenged in the criminal trial of *United States* v. *Ahmad*, 335 F.Supp. 1198, 1200 (M.D.Pa. 1971), wherein Judge Herman ruled the wiretap illegal under *District Court*, and, therefore, ordered the fruits of the surveillance suppressed. Furthermore, the Third Circuit, when presented with these determinations, stated, 499 F.2d 851, 853 n. 2 (3d Cir. 1974):

> Judge R. Dixon Herman, who presided over the [Harrisburg Eight] case, found that there had been an unauthorized and illegal wiretap.[2]

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[2] The electronic surveillance apparently had been performed without a court order in accordance with a Presidential determination that national security was involved. Judge Herman relied on the decision of the Court of Appeals in *United States* v. *United States District Court*, 444 F.2d 651 (6th Cir. 1971), later affirmed by the United States Supreme Court at 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) in deciding that the wiretap was illegal.

*The Electronic Surveillance In This Case Is Subject To The Procedures And Remedies Of 18 U.S.C. §§ 2510-2520.*

The defendants contend that the national security electronics surveillance in this case does not violate any of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The basis of their contention is that § 2511(3) of the Act exempts electronic surveillances conducted for national security purposes. Section 2511(3) provides:

> (3) Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necesary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. . . .

The United States Supreme Court stated in *District Court* that the purpose of § 2511(3) was to "provide that the Act shall not be interpreted to limit or disturb such power as the President may have under the

Constitution. In short, Congress simply left presidential powers where it found them." 407 U.S. at 303, 92 S.Ct. at 2130.

The question as to whether electronic surveillance for national security purposes became subject in 1968 to the procedures and remedies of 18 U.S.C. §§ 2510-2520 was determined by the District of Columbia Circuit in *Zweibon* v. *Mitchell*, 170 U.S.App. D.C. 1, 516 F.2d 597 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). In an opinion for the plurality by Judge Wright, the court held that electronic surveillance of the type involved in the instant case is subject to both the procedures and the remedies provided by the Act.[10] In his opinion Judge Wright reasoned:

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[10] Judge Wright described the responsibility of the judiciary in the area of electronic surveillance for "national security" as follows:

> Undoubtedly the President, our Chief Executive and Commander-in-Chief of our Armed Forces, is imbued by the Constitution with vast and indispensable powers for dealing with the vital problems generated by our relations with foreign powers, including the duty to protect this country from foreign aggression or subversion. The very existence of such tremendous power, however, renders it susceptible to abuse and endangers those fundamental personal liberties which the Government was instituted to secure for its citizens and whose exercise elevates the nation to a statute worthy of defense. Thus, although the attempt to claim Executive prerogatives or infringe liberty in the name of security and order may be motivated by the highest of ideals, the judiciary must remain vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds. 170 U.S.App.D.C. at 8-9, 516 F.2d at 604-05 (footnotes omitted).

Since we do not believe the [*District Court*] case held the standards and procedures of Title III to be inapplicable when a purported national security surveillance is involved, we must look to the language and legislative history of Section 2511(3) to determine congressional intent in its enactment. Section 2511(1) unequivocally declares that '[e]xcept as specifically provided in this chapter,' interception of '*any* wire or oral communication' is illegal. Section 2511(3), however, only states that '[n]othing contained in this chapter * * * shall limit the *constitutional* power of the President' to take the actions he deems necessary in the field of national security. Since Section 2511(3) is merely a disclaimer that 'constitutional' actions by the President are not to be invalidated under the statute, it is reasonable to assume that Congress intended to prohibit 'unconstitutional' Executive surveillance, which would therefore be 'in violation of this chapter' within the comprehension of the damages provision of Title III. Thus, even if the *procedures* of Title III were inapplicable to national security wiretapping, the *remedies* of Title III should apply to *unconstitutional* exercises of presidential power.

An analysis of the legislative history of Title III also indicates that it would be reasonable to interpret Section 2511(3) as a statement that the question reserved in *Katz* should be left for judicial resolution, but that, *to the extent the President does not have the constitutional power to engage in warrantless surveillance activities, the procedures and remedies of Title III are fully operative.* This interpretation is fully consistent

> with the [*District Court*] Court's understanding of the legislative history of Section 2511(3) and the two-decade struggle in Congress concerning wiretap legislation.

*Id.* at 67-68, 516 F.2d at 663-64 (emphasis supplied in part). *Accord, Kinoy* v. *Mitchell*, 331 F.Supp. 379, 382 (S.D.N.Y. 1971).

We agree with *Zweibon* that the procedures and remedies of Title III apply to all electronic surveillance which must, by virtue of the Fourth Amendment, be conducted pursuant to a warrant. Since, as we have heretofore pointed out, a warrant was constitutionally required under the circumstances of this case, it would appear that the remedies provided in Title III should be made available to the plaintiff, unless the defendants establish an affirmative good faith defense, as hereinafter discussed.[11]

*The Defendants Are Limited To An Affirmative Good Defense.*

The defendants seek to avoid liability by asserting that they have an absolute immunity from suit for discretionary acts done within the scope of their authority because they are high ranking government officials. They contend that this is the law in the Third Circuit and cite three pre-1975 cases: *Skehan* v.

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[11] Although it does not appear that the defendants are contending that the nonretroactivity doctrine of *Chevron Oil* should be applied to nullify the effect of Title III in this case, it is nevertheless our opinion that the reasons hereinbefore stated for the retroactive application of *District Court* would likewise be applicable here.

*Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 43 (3d Cir. 1974), *vacated*, 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975); *Fidtler* v. *Rundle*, 497 F.2d 794, 802 (3d Cir. 1974); and *Johnson* v. *Alldredge*, 488 F.2d 820, 824 (1974). However, as the Third Circuit stated in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F2d 53, 59-60 (3d Cir.) (en banc), *cert. denied*, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976):

> [u]pon . . . consideration we conclude that *Wood* v. *Strickland* [420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)] significantly modified the law of immunity upon which we relied in affirming the district court . . . . It was our view [then] that if the government officials performing discretionary government duties acted within the scope of their official responsibilities, they were immune from damage actions . . . .
>
> *Wood* v. *Strickland*, *supra*, demonstrates that we erred in assuming that there still existed an unqualified, common law immunity covering non-judicial . . . government officials performing adjudicatory functions.

It therefore appears that government officials, even high ranking government officials such as the Attorney General of the United States, no longer have available to them the defense of absolute immunity on the ground that they were performing discretionary duties within the scope of their official responsibilities.

We must determine, however, whether the Attorney General, who, next to the President, is our na-

tion's highest executive officer directly responsible for the administration of justice, is entitled to an absolute immunity in connection with his authorization of the unconstitutional electronic surveillance in this case. Fortunately *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) provides some guidance for the resolution of this issue. In *Imbler*, the United States Supreme Court decided that a state prosecuting attorney who acted within the scope of his duties by initiating and pursuing a criminal prosecution was entitled to absolute immunity. In arriving at its determination that a prosecutor does have absolute immunity in the performance of acts "intimately associated with the judicial phase of the criminal process," the Court placed reliance upon *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927), in which absolute immunity was granted to a special assistant to the Attorney General of the United States in connection with an action of malicious prosecution based on an indictment and prosecution. In delineating the boundaries of its holding, however, the Court stated:

> [w]e agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative of-

> ficer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983. 424 U.S. at 430, 96 S.Ct. at 995.

Here we are concerned with actions of the Attorney General in authorizing a warrantless wiretap. As the *Imbler* Court stated in a footnote:

> [p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them. *Id.* at 431 n. 33, 96 S.Ct. at 995 n. 33.

It is therefore our opinion that in authorizing the warrantless wiretap in this case, the Attorney General was functioning as an administrator rather than as an officer of the court. We must conclude that the Attorney General is not entitled to absolute immunity in connection with this warrantless electronic surveillance.

*The Defendants May Assert A Good Faith Affirmative Defense To Plaintiff's Fourth Amendment Claim.*

In *Zweibon*, decided prior to the Supreme Court's pronouncements in *Imbler*, the District of Columbia Circuit Court determined that in a civil action for

damages, the Attorney General was entitled to assert a good faith defense in connection with his authorization of a warrantless wiretap.[12] We shall follow the lead of our learned colleague, Judge VanArtsdalen, in *Burkhart* v. *Saxbe*, 397 F.Supp. 499, 502 (E.D.Pa.1975) and hold that the Attorney General and the two FBI agents, the defendants who remain in this case, are permitted a good faith defense to the plaintiff's Fourth Amendment claim. The burden is therefore on the defendants, as stated in *Skehan*, to come forward and convince the trier of fact by a preponderance of the evidence that (1) they did not know and reasonably need not have known that their actions would constitute a violation of plaintiff's constitutional rights; and (2) they acted without a malicious intention to deprive the plaintiff of his constitutional rights or cause him to suffer other injury.

*The Defendants May Assert A Good Faith Affirmative Defense To Plaintiff's Statutory Claim.*

We are also presented with the question whether there is any defense available to the defendants in connection with the plaintiff's claim for damages pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. *Zweibon* is the only case specifically discussing this issue which has been called to our attention. In *Zweibon*, after holding that the electronic surveil-

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[12] *See also, Halperin* v. *Kissinger*, 424 F.Supp. 838, 842, 844 n. 8, 845 (D.D.C. 1976); *Hallinan* v. *Mitchell*, 418 F.Supp. 1056, 1057 (N.D.Cal. 1976).

lance authorized in 1970 by the Attorney General without a court order was illegal, the court concluded that Congress intended that the defendants should have a good faith defense to the statutory claim, although § 2520 of Title 18 specifically provides:

> A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.[18]

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[18] Title 18 U.S.C. § 2518(7) provides:

> Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
>
> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

In accordance with *Zweibon*, we hold that the defendants shall have the opportunity to present the same good faith defense to the plaintiff's statutory claim, as heretofore set forth from the *Skehan* decision.

*A Genuine Issue Of Material Fact Exists.*

The defendants urge this Court to enter summary judgment in their favor. It is their position that the record establishes their good faith affirmative defense. Other than the pleadings and briefs, the only documents which have been filed are defendants' answers to interrogatories and the deposition of John Mitchell. The plaintiff opposes this motion, but has filed no affidavits or depositions. As heretofore determined, the defendants have the burden of establishing by a preponderance of the evidence that (1) they did not know and reasonably need not have known that conducting the warrantless wiretap in this case was unconstitutional; and (2) they acted without malicious intention to (a) deprive the plaintiff of his constitutional rights or (b) cause him to suffer other injury. *Skehan, supra.*

In connection with the defendant's motion for summary judgment, the law is clear that the defendants have the burden of demonstrating that there is no genuine issue of material fact. *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F.2d 817, 824 (3d Cir. 1951), quoted with approval in *Ettinger* v. *Johnson*, 556 F.2d 692, 696 (3d Cir. 1977). Moreover, in considering the motion for summary judg-

ment, the Court must view the evidence in a light most favorable to the party opposing the motion. *Goodman* v. *Mead Johnson & Company*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). In considering the evidence contained in the deposition of John Mitchell and the defendants' answers to interrogatories in a light most favorable to the plaintiff, it is apparent that there are genuine issues of material fact concerning the good faith defense of the defendants. As the Third Circuit in *GAF* v. *Amchem Products, Inc.*, 570 F.2d 457 at 461 (3d Cir. 1978) pointed out: "[a] factfinder might draw a different inference, but on a motion for summary judgment the inference favorable to [the party opposing the motion] must prevail." Furthermore, as stated in *Toebelman* v. *Missouri-Kansas Pipe Line Company*, 130 F.2d 1016, 1018 (3d Cir. 1974), "[t]he evidence contradicting or impeaching that of the movant . . . may appear in the movant's own evidentiary materials." Finally, Wright & Miller, *Federal Practice & Procedure* § 2712, at 278-82 (1973), quoted with approval in *Rosenthal* v. *Rizzo*, 555 F.2d 390, 393 (3d Cir. 1977), provides: "[a] motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of fact issues."

With respect to the plaintiff's motion for summary judgment, we find that in viewing the evidence in the deposition and answers to interrogatories in a light favorable to the defendants, the plaintiff has

likewise failed to carry his burden of demonstrating that there is no genuine issue of material fact.

Furthermore, after making its determination that the defendants in *Skehan* were entitled to a good faith defense, the Court remanded the case for "findings of fact with respect to the [good faith] immunity of each defendant." Accordingly, an order will be entered denying the parties' cross-motions for summary judgment on the ground that there are genuine issues of material fact in connection with the defendants' affirmative defense of good faith.

## APPENDIX I

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 74-826

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KATHERINE W. BURKHART, ET AL.

*v.*

WILLIAM SAXBE, ET AL.

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[Filed Aug. 23, 1984]

### OPINION AND ORDER

VANARTSDALEN, J.

The primary issue before the court is whether John N. Mitchell is liable in damages to persons whose conversations were overheard during non-consensual telephone wiretaps that were authorized by him as "national security" surveillances in his capacity as Attorney General of the United States. The parties have filed cross motions for summary judgment and agree that there are no genuine issues of material fact in dispute.

The two wiretaps in question, one on the telephone of William Davidon, the other on the telephone of the Black Panther Party, were authorized, installed, implemented and terminated more than a year prior to the decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972) (hereafter referred to as "*Keith*"). By the time *Keith* was decided on June 19, 1972, the wiretaps at issue had long since been terminated (at least as of February 10, 1971). In *Keith*, the Supreme Court held for the first time that a wiretap surveillance, even when authorized by the Attorney General for "domestic national security purposes," required the issuance of a judicial warrant before installation of the wiretap.

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (citations and footnote omitted), the Supreme Court announced a rule of law that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Court further stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

*Id.* (footnotes omitted).

In *Forsyth* v. *Kleindienst*, 729 F.2d 267 (3d Cir. 1984) *(Forsyth II)*, Circuit Judge Weis, in dissent,[1] opined that former Attorney General John N. Mitchell was entitled, at least, to the type of "qualified immunity" described in *Harlow*, and on the basis of the record, entitled to summary judgment in his favor.[2] Primarily for the reasons so clearly set forth by Judge Weis in *Forsyth II*, I conclude,

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[1] Although I may not adopt a dissenting opinion of the Court of Appeals for the Third Circuit in preference to a majority opinion, in *Forsyth II*, the majority opinion did not address the substantive issue of qualified immunity. The majority of the panel concluded that the question was not properly before the court because the district court had not entered a final judgment as to damages.

[2] The wiretap in *Forsyth II* involved a wiretap on the telephone at the residence of William Davidon. This same wiretap is one of the two wiretaps at issue here. Thus, if the Attorney General is immune in *Forsyth II* under the *Harlow* doctrine, he necessarily is likewise immune in the present action for all telephone conversations overheard on the Davidon wiretap.

on the basis of the record established in this case that the defendant, John N. Mitchell, is entitled to qualified immunity and that summary judgment should be entered in his favor.[3]

This case and the *Forsyth* case have been the subject of several published opinions in both the district court and the court of appeals. *See Burkhart* v. *Saxbe*, 448 F. Supp. 588 (E.D. Pa. 1978), *aff'd in part and remanded sub nom. Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) *(Forsyth I)*; *Forsyth* v. *Kleindienst*, 447 F. Supp. 192 (E.D. Pa. 1978), *aff'd in part and remanded*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) (also cited as *Forsyth I* because the court of appeals decided both cases in a single opinion); *Forsyth* v. *Kleindienst*, 551 F. Supp. 1247 (E.D. Pa. 1982), *stay granted*, 700 F.2d 104 (3d Cir. 1983), *aff'd in part, dismissed in part, petition for mandamus denied*, 729 F.2d 267 (3d Cir. 1984) *(Forsyth II)*. Consequently, only a few essential facts need be reiterated.

I initially ruled that a full evidentiary hearing was required to determine

> (1) whether the wiretaps in question were conducted for national security purposes or solely for the purpose of investigating criminal or political activity; (2) whether, even if conducted for national security purposes, the defendants are immune from any liability for their failure to secure a warrant in compliance with the fourth amendment and (3) whether, in any event, this surveillance was conducted in a reasonable manner under the fourth amendment as interpreted in *Berger* v. *New York*, *supra*.

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[3] Clarence Kelley and William Saxbe are the only other identified defendants. The record fails to show that they were in any way involved in authorizing, installing, monitoring or otherwise conducting or supervising the wiretaps. I previously so ruled, but judgment was never formally entered in their favor. *See Burkhart* v. *Saxbe*, 448 F. Supp. 588, 607 (E.D. Pa. 1978), *aff'd in part and remanded sub nom. Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S.. 913 (1981). Consequently, summary judgment will be entered in favor of all defendants and against all plaintiffs.

*Burkhart*, 448 F. Supp. at 610. The court of appeals decision directly addressed only the issue of absolute immunity. "We hold that the Attorney General will be absolutely immune from suit for his decision to authorize the warrantless electronic surveillances only if his decision was made in performance of a function that is intimately related to the judicial process. *Forsythe I*, 599 F.2d at 1217.

In *Forsyth II*, the court of appeals ruled that the former Attorney General had not established a right to absolute immunity as to the Davidon wiretap, under its formulation set forth in *Forsyth I;* namely, he had not proved that the wiretap was for "a function that is intimately related to the judicial process." *See Forsyth I*, 599 F.2d at 1217. Although theoretically in the *Burkhart* case there could be different evidence as to the purpose of the Davidon wiretap, it would be a strange result to find absolute immunity in *Burkhart* and not in *Forsyth* where the overheard conversations for which damages are sought arose out of the same wiretap authorization on the telephone of William Davidon. In any event, to the extent the issue of absolute immunity may still be open, under the *Forsyth I* test, there is clearly no absolute immunity. The former Attorney General has always taken the position that both the Davidon and Black Panther Party wiretaps were for "national security" and not for criminal investigative purposes.[4] Because I conclude that the former Attorney General is entitled to qualified immunity as a complete defense to this action, it becomes, in any event, unnecessary to decide the issue of absolute immunity.

On the present motion for summary judgment, defendant John N. Mitchell relies solely on the contention that under *Harlow* he has established all that is necessary to come

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[4] If not foreclosed by *Forsyth II*, I would nevertheless conclude that the "special functions" doctrine suggested in *Harlow*, 457 U.S. at 811-12, would provide absolute immunity from a civil damage action against the former Attorney Geneal in this case. In addition, the Black Panther Party wiretap would appear to come within the "foreign national security wiretap" exception to the warrant requirement. *See Forsyth I*, 599 F.2d at 1206. *See also United States* v. *Butenko*, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974).

within the protection of a qualified immunity. I fully agree. In *Harlow* the Supreme Court held:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818 (citations and footnote omitted). It is not necessary to review the long and uncertain path of the law leading up to *Keith* where the Supreme Court finally squarely ruled that "prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe." 407 U.S. at 324.

Although logical argument may be made that the ultimate decision was "foreshadowed" by earlier case law and was not a break with prior law, nothing in *Harlow* suggests that officials must, at peril of being liable for civil damages, correctly foretell the future of Supreme Court and other court decisions in areas of constitutional conduct. The test enunciated in *Harlow* is that of "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 812 (citations and footnote omitted).

In the event that there may have been any lingering doubts as to the Supreme Court's holdings in *Harlow*, the Court recently emphasized in *Davis* v. *Scherer*, 104 S. Ct. 3012 (1984), the necessity of applying an objective test and that the law must have been clearly established:

> *Harlow* v. *Fitzgerald*, *supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. Under *Harlow*, officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ... Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." ... No other "circumstances" are relevant to the issue of qualified immunity.

. . . .

> We conclude that the District Court correctly held that appellee has demonstrated no violation of his *clearly established* constitutional rights.

*Id.* at 3018, 3019 (emphasis in original). The Court made quite explicit that an official need not be clairvoyant when it noted:

> Yet, under appellee's submission, officials would be liable in indeterminate amount for violation of *any* constitutional right—one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation. . . .

*Id.* at 3019 (emphasis in original).

The decisions of the Supreme Court have consistently held that governmental officials, exercising discretionary functions are entitled to "some form of immunity from suits for civil damages." *Nixon* v. *Fitzgerlad*, 457 U.S. 731, 744 (1982); *Harlow*, 457 U.S. at 806. Qualified immunity for executive officials is the norm. *Harlow*, 457 U.S. at 807. Where a defendant establishes that he is an executive official, performing discretionary duties, the plaintiff must "overcome" the qualified immunity. The concluding paragraph of *Davis* v. *Scherer* states:

> A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. As appellee has made no such showing, the judgment of the Court of Appeals is reversed. . . .

104 S. Ct. at 3021.

The applicable Supreme Court decisions establish that in order to prevail plaintiffs have the burden of establishing two distinct elements. One, that the law was clearly established at the time the wiretaps were authorized; and two, that the former Attorney General, as a "reasonable person" would have known the law. Plaintiffs suggest that if a reasonable person would know that at some time in the future the law would be clearly established that certain conduct is (and logically always was) unconstitutional, such would be a sufficient showing to allow the case to proceed. As hereto-

fore noted, the Supreme Court has never suggested that a governmental official must anticipate the future course of the law.

I think it is unnecessary to review the case law as it existed in 1970 when the Davidon and the Black Panther Party wiretaps were authorized by the Attorney General. In *Keith* the Supreme Court certainly recognized that it had never previously ruled on the question of the requirement for a warrant in domestic security wiretaps. The opening paragraph of *Keith* makes this clear:

> The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the congress or a definitive decision of this Court. *This case brings the issue here for the first time.*

407 U.S. at 299 (emphasis added) (footnote omitted).

In short, I completely agree with the analysis of Judge Weis in his dissenting opinion in *Forsyth II*. I likewise am convinced that by any fair objective test, at the time the wiretaps in question were authorized by the Attorney General and throughout the entire time that the wiretaps were in place, the law that domestic national surveillance wiretaps authorized by the Attorney General required warrants was not "clearly established." Indeed, the rule of constitutional law, for which plaintiffs seek damages from the former Attorney General, was not then even "established," let alone "clearly established" by controlling case law.

The requirement that the surveillance be for "national security" must also be addressed. Case law does not clearly define what constitutes a "national security" wiretap. Also, in a case such as this, where the claim of qualified immunity should, if possible, be determined without a trial, *see Harlow*, 457 U.S. at 818; *Davis* v. *Scherer*, 104 S. Ct. at 3020-21, the procedure by which the factual determination that a wiretap is a "national security" wiretap, as opposed

to a routine criminal or administrative investigation, has not been outlined by appellate court decision.

The subjective state of mind of the Attorney General in authorizing the wiretap should not be investigated under *Harlow*. If the record discloses a rational national security concern, this sould suffice, even though there may hve been other possible reasons or motives. *Halperin* v. *Kissinger*, 578 F. Supp. 231 (D.D.C. 1984). Plaintiffs argue that if it appears that there is "any significant purpose other than national security," the *government* should not be allowed to rely on "the national security label." Plaintiffs' Brief at 28. I do not agree, because if such "other purposes" test is utilized, lengthy fact-finding hearings and testimony as to the subjective state of mind of the official authorizing the wiretaps would bring about the precise harms that *Harlow* sought to obviate.

Whatever may be a proper definition of a "national security" wiretap, and its full contours, both the Davidon and Black Panther Party wiretaps certainly qualify as national security wiretaps. In effect, I previously so ruled in this case, *Burkhart*, 448 F. Supp. at 596-98, although I concluded that there remained a factual issue as to whether the surveillances may have had some other purposes. To the extent that my prior opinion suggested that the "sole purpose" of the wiretap had to be for national security, it must be disavowed in light of *Harlow*. *Harlow* requires a determination of the facts without inquiry into the subjective state of mind of the official.

In addition to the facts set forth in the discussion of the "national security" issue in *Burkhart*, 448 F. Supp. at 596-98, the court of appeals also extensively reviewed the history leading up to the implementation of the Davidon and Black Panther Party wiretaps in *Forsyth I*, 599 F.2d at 1205-06. In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084 (D.C. Cir. 1981), the District of Columbia Circuit held that the warrantless wiretap on the Black Panther Party was, under the submissions before that Court, "the clearest justification for a national security exception to Title III." Finally, Judge Broderick of this court, in *Forsyth* v. *Kleindienst*, 551 F. Supp. 1247, 1252 (E.D. Pa. 1982), *stay*

*granted*, 700 F.2d 104 (3d Cir. 1983), *aff'd in part, dismissed in part, petition for mandamus denied*, 729 F.2d 267 (3d Cir. 1984), concluded that the Davidon wiretap was not authorized pursuant to the Attorney General's prosecutorial duties. Judge Broderick noted that there was extensive evidence that showed the wiretap was for national security, including the deposition testimony of John N. Mitchell (taken before the *Harlow* decision) that the "'focus'" of the wiretap was "'[t]he gathering of information necessary to protect the national security and to get information on foreign intelligence.'" Judge Broderick stated that "[t]he Court has taken defendant Mitchell at his word." *Id.*

I conclude, on the basis of the entire record in this case, that the two wiretaps in question, *i.e.*, the Davidon and Black Panther Party wiretaps, were authorized by the defendant while he was the Attorney General of the United States, for national security purposes. I further conclude that at the time of the authorizations, including the authorized extensions of the wiretaps, the law was not "clearly established" that a warrant was required before implementing the wiretaps. The defendant is therefore entitled to qualified immunity.

In my prior opinion, 448 F. Supp. at 610, I directed that an evidentiary hearing would be held to determine whether the surveillances were conducted in a reasonable manner, compatible with the fourth amendment. Holding an evidentiary hearing for such purpose is doubtful procedure under *Harlow*. Nevertheless, there is probably some "reasonableness" requirement that must be met, to be determined from the objective record.

Where lawful wiretaps have been installed for purposes of normal criminal investigation, the law has long been clear that the carrying out of the wiretaps must be "narrowly circumscribed" with "appropriate safeguards" to prevent unnecessary invasions of privacy. *Katz* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41 (1967). Although neither *Katz* nor *Berger* detailed the exact requirements for limiting the scope and duration of wiretaps, Congress, in response, enacted Title III of the

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. 2510-2520), which included strictures upon authorized wiretaps that they "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . ." 18 U.S.C. § 2518(5). The inquiry as to whether the agents in carrying out the surveillance acted "reasonably" is to be based on an objective not a subjective standard. "Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Scott* v. *United States*, 436 U.S. 128, 139 (1978).

In *Keith*, the Supreme Court carefully avoided setting the standards of "reasonableness" for domestic national security surveillances. In doing so, the court further made clear, that although a warrant was required, the requirements of Title III might not be the proper tests:

> Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specific crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.

*Keith*, 407 U.S. at 322-23. The Supreme Court further suggested that Congress might decide that "the time and reporting requirements need not be so strict as those in § 2518." *Id.* at 323. Considering that *Keith* was decided more than a year after the wiretaps involved in this case were terminated, one can only conclude that as to national security wiretaps, there was no "clearly established" constitutional or statutory standards or guidelines for the Attorney General to follow in authorizing the wiretaps, other than the nebulous concept that they must be "reasonable."

Although plaintiffs have contended that the wiretaps do not properly fit within the somewhat unclear definition of "national security" surveillances, I do not understand plaintiffs to contend that it was unreasonable, per se, for the At-

torney General to authorize the wiretaps. Clearly he had probable cause to believe that the wiretaps might provide valuable intelligence information as to the matters under investigation and that the matters being investigated were properly within the Attorney General's sphere of duties. Plaintiffs do contend that the surveillances were not properly limited and minimized.

The Davidon wiretap was originally authorized on November 6, 1970, for one month, and an additional extension of one month was granted. The wiretap was terminated on January 6, 1970. The agents were instructed to record all conversations unless it was known that one of the parties to the conversation was a defendant in a federal criminal case or was an attorney for a criminal defendant. *Forsyth I*, 599 F.2d at 1206. The Black Panther Party wiretaps were in place from June 1, 1970 until February 10, 1971. Although there appears to be little to suggest that the wiretaps were otherwise limited in time or scope, there was no "clearly established" law that national security wiretaps had to be in any way limited.

In the last chapter of *Zweibon* v. *Mitchell*, 720 F.2d 162 (D.C.Cir. 1983) *(Zweibon IV)*, summary judgment was entered in favor of John N. Mitchell in regard to wiretaps installed on the telephones of the Jewish Defense League in 1970 and 1971. The wiretaps had apparently been authorized to be installed without a warrant and against the advice of legal counsel to the Attorney General. The court of appeals in *Zweibon IV* concluded that as of the time of the authorizations "there existed no clearly established warrant or reasonableness requirement." *Zweibon IV*, 720 F.2d at 170. The court noted, however, that the Attorney General had himself imposed some limited "immunization procedures"; *i.e.*, federal criminal defendants and attorneys for criminal defendants were not to be monitored.

In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1082 (D.C. Cir. 1981), a case involving Black Panther Party wiretaps at locations different from those involved in the present case, the court stated that "there was no judicially imposed reasonableness requirement for national security wiretaps at the time. . . ."

My final conclusion is that on the basis of the record, and consistent with *Zweibon IV* and *Sinclair* v. *Kleindienst*, of the District of Columbia Circuit, the former Attorney General of the United States, John N. Mitchell, is entitled to "qualified immunity," as defined in *Harlow* and *Davis* v. *Scherer*, in that he did not violate any clearly established constitutional or statutory rights of any of the plaintiffs, whose conversations were overheard by government agents who were conducting wiretap telephone surveillances without a warrant, as authorized by John N. Mitchell. Summary judgment will therefore be entered in favor of all defendants, against all the plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

Civil Action No. 74-826

---

KATHERINE W. BURKHART, ET AL.

*v.*

WILLIAM SAXBE, ET AL.

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[Filed Aug. 23, 1984]

**ORDER**

Upon consideration of the cross motions for summary judgment filed by the plaintiffs and the defendants, together with the briefs of the parties, and upon the record in this case, for the reasons set forth in the accompanying opinion, it is

Ordered that plaintiffs' motion is denied and defendants' motion is granted; it is further

Ordered that judgment is entered in favor of the defendants, William Saxbe, Clarence Kelley, John N. Mitchell, John Doe and Richard Doe, and against the plaintiffs, Katherine W. Burkhart, Judith Chomsky, Eva Gold, Dina Portnoy, Candy Putter, and Joshua Markel.

BY THE COURT:

/S/ _____

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No. 84-335

In The

# Supreme Court of the United States

October Term, 1984

JOHN MITCHELL,

*Petitioner,*

vs.

KEITH FORSYTH

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## REASONS FOR DENYING THE WRIT

1. The district court's order denying petitioner's summary judgment motion is clearly not a "final decision" 28 U.S.C. § 1291. Therefore, this Court has jurisdiction only if the "collateral order doctrine" is appropriately invoked. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The final judgment rule—that a party may not appeal under 28 U.S.C. § 1291 until the district court litigation is concluded on the merits—"is an historic characteristic of federal appellate jurisdiction." *Flanagan v. United States,* — U.S. —, 79 L.Ed.2d 288, 293 (1984), quoting *Cobb'edick v. United States,* 309 U.S. 323 (1940). It represents the "firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States,* 431 U.S. 651 (1977).

There is a "narrow exception," permitting interlocutory appeals in a "small class" of cases in which an order, though technically not final, nonetheless is sufficiently collateral as to be effectively "unreviewable" on appeal from the final judgment. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981); *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978). But the so-called collateral order doctrine cannot be applied to the qualified immunity defense except by disregarding the reasons justifying that limited exception, and ignoring the Supreme Court's direction that the exception be kept limited.

Qualified immunity does not share the attributes that warrant applying the collateral order doctrine to absolute immunity claims. Indeed, the very different meanings of the adjectives that modify, and thus define the two immunities—"absolute" and "qualified"—point to the critical conceptual and practical distinctions that render the former properly subject to appeal, and the latter not.

In our legal system an immunity is deemed "absolute" only because in certain rare circumstances the overriding interests of society at large are best served by protecting the beneficiary of that immunity from being civilly

held accountable for wrongdoing. However, an immunity that is merely conditional, or "qualified," necessarily reflects the far more common judgment that, even though the defendant is a government official, society's interests can tolerate adherence to the general rule demanding that a person account for his or her misdeeds, though in some instances the defendant should be shielded from ultimate liability by a defense of good faith. Thus, an "absolute immunity" claim *must* be reviewed on appeal before trial if it is to have its intended effect, because it is meant to provide an absolute protection against that very trial. Such immediate review is not necessary—and therefore should not be permitted—to preserve the integrity of "qualified immunity" because it is only an affirmative defense against liability and, like all such defenses, is satisfactorily protected by appellate review after final judgment.

In the very first case in which this Court applied the collateral order doctrine to an absolute immunity claim, the defendant was asserting rights protected by the Double Jeopardy Clause of the Fifth Amendment—which the Court described as "a guarantee against being twice put to *trial* for the same offense." *Abney v. United States, supra* at 661 (emphasis in original). In other words, the defendant was "contesting the very authority of the Government to hale him into court to face trial." *Id.*, at 659. That claim would necessarily be irreparably lost—in the words of the Supreme Court, "effectively unreviewable," *Coopers & Lybrand v. Livesay, supra,* at 468 —if the defendant had to wait until after trial for appellate review of the immunity that was meant to shield him from the trial itself. 431 U.S. at 662. See also *Helstoski*

*v. Meanor,* 442 U.S. 500 (1979); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982). Qualified immunity, by its nature being just a *conditional* protection against liability, is like any other affirmative defense—such as the statute of limitations, res judicata, or lack of jurisdiction— which may be absolute and dispositive if successfully urged by a moving party, but which must await final judgment for appeal even if wrongly decided by the district court.

The very first limitation the Supreme Court imposed on the collateral order doctrine is that it apply only to a "small class of interlocutory orders." *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982). However, because the same qualified immunity defense raised in this case is also asserted by virtually every defendant in civil rights cases, the class of qualified immunity cases is anything but small.[1] By comparison, cases involving Double Jeopardy Clause immunity, *Abney v. United States, supra,* or Speech or Debate Clause immunity, *Helstoski v. Meanor, supra,* or Presidential immunity, *Nixon v. Fitzgerald, supra,* are rare indeed.

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[1]The latest available statistics compiled by the United States Judicial Conference reveal that in the 12 month period ending June 30, 1983 there were 4,418 civil rights cases (including prisoner cases) filed in the district courts of this Circuit alone. 1983 *Reports of the Proceedings of the Judicial Conference of the United States [and the] Annual Report of the Director of the Administrative Office of the United States Courts,* Table C-3, "United States District Courts Civil Cases Commenced, By Nature of Suit and District As of June 30, 1983" at 248.

Not only will the qualified immunity defense be raised in most of those cases, but it can be expected to arise as well in an unknown number of cases filed in categories other than "civil rights" in which government officials are defendants.

The position urged by petitioner would permit immediate appellate review every time a district court denied any official defendant a qualified immunity defense. And it is virtually certain that the defendant who is permitted to appeal will do so, because there is nothing to lose. Even if the appeal is unsuccessful on the merits, the defendant will have successfully delayed the trial court proceedings, and the plaintiff will have suffered "the obstruction to just claims . . . the harassment and cost" of the interlocutory appeal. *Firestone Tire & Rubber Co. v. Risjord, supra* at 374.

As recently recognized by the Third Circuit in *refusing* to extend the collateral order doctrine to the qualified immunity defense:

> "The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. [We] fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss [would] open the suices to a flood of interlocutory appeals crushing us even further under a weight of our own making." *Forsyth v. Kleindienst,* 729 F.2d at 274, quoting *Forsyth v. Kleindienst,* 700 F.2d 104, 110 (3rd Cir. 1983) (Opinion Sur Grant of Stay) (Sloviter, J., dissenting).

Morever that "crushing" impact on the appellate docket is almcst entirely avoidable, since in most cases a denial of qualified immunity will never reach a court for review, but rather will be incorporated into other resolutions of the case before appeal (e.g. settlement, defendants' success

on other dispositive motions, judgment for defendants on the merits).[2]

The procedural setting of this case also counsels against allowing an interlocutory appeal. This is *not* a case where the interlocutory appeal will save either pretrial or trial time. Discovery was completed several years ago and summary judgment has been entered for plaintiff. The only issue left for consideration is that of damages. Accordingly, none of the purposes that are allegedly served by allowance of interlocutory appeals are even present in this case.

Furthermore, respondent also presents a statutory claim for damages under 18 U.S.C. § 2520, which is not subject to interlocutory review, and must still be decided by the District Court. No qualified immunity attaches to this claim since the good faith defense allowed by the statute at the time of this surveillance was limited to reliance on a court order or emergency, neither of which is present in this case. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (no common law good faith defense to Title VII claim).[3]

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[2]We do not contest petitioner's claim that there is a conflict in the circuits on this issue.

[3]18 U.S.C. § 2520 provided "a good faith reliance on a court order or on the provisions of section 2518(7) of this chapter [governing emergency powers] shall constitute a complete defense to any civil or criminal action brought under this chapter."

The statute was amended, effectively February 1, 1971: A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

2. Petitioner is not entitled to qualified immunity.[4] Initially, it should be noted that the merits of the qualified immunity defense were not addressed by the Court of Appeals. Even if this Court were to rule that this matter can be appealed on an interlocutory basis, the merits of the claim should first be addressed by the court below.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) this Court cautioned that its holding would:

> . . . provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts."

In this case, respondent relies on a cardinal principle of our constitutional system: that a government official may not conduct searches and seizures without prior judicial approval except in limited, specifically designated exigent circumstances. If an exception to the warrant requirement has not been articulated, the Fourth Amendment requires a warrant before a person's privacy can be invaded. See *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971). The Supreme Court's construction of the Fourth Amendment gave petitioner no basis to believe that his actions in this case were lawful.

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[4]As a threshold matter there is a substantial question as to whether the wiretaps in this case were predicated on national security grounds. The district court found it unnecessary to decide this issue. App. 59a. Since the failure to prove a legitimate national security basis for the surveillance would establish liability under 18 U.S.C. § 2520 and the Fourth Amendment, *Smith v. Nixon*, 606 F.2d 1183, 1188 (D.C. Cir. 1979); *United States v. United States District Court, supra*, 407 U.S. at 780 (White, J., concurring), this petition is premature.

*Katz v. United States,* 389 U.S. 347 (1967), "clearly established" the right of the respondent in this case to be free from "[s]earches conducted outside the judicial process, without prior approval of a judge or magistrate." 389 U.S. at 357. A footnote in *Katz* reserved one area for future decision (389 U.S. at 358, n.23):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

It is important to note that *Katz* was unequivocal in its statement of established Fourth Amendment jurisprudence: all searches must receive prior judicial approval except for limited, specifically stated exceptions to the warrant requirement. *Katz* did not announce a national security exception; therefore, the Fourth Amendment clearly established the need for such a warrant in this kind of case, until the Court specifically recognized a "national security" exception. Because the Fourth Amendment warrant requirement is presumed to apply unless a clear exception excuses compliance, and because no exception for national security cases was established when petitioner acted, the law to which he was subject was "clearly established."

Furthermore, whatever basis there was to believe that "national security" taps were not subject to the warrant requirement, was limited to *foreign* intelligence surveillance. In *Alderman v. United States,* 394 U.S. 165 (1969), Justice Harlan limited national security cases to those "in which the defendant is charged . . . with spying for a foreign power." Specifically, Justice Harlan was concerned with "espionage case[s]"—*i.e.,* where the defend-

ant has passed secrets to a foreign power. 394 U.S. at 198. Justice Fortas characterized "national security material" as a "rigid and limited" category, including only activities "specifically directed to acts of sabotage, espionage, and aggression by or on behalf of foreign states." 34 U.S. at 209.

Justice Stewart's concurrence in *Giordiano v. United States,* 394 U.S. 310, 313 (1969), further indicated the limited nature of the issue on which decision was reserved in *Katz.* Terming the putative exception as one relating to the "gathering of foreign intelligence information," Justice Stewart noted the necessity of protecting "national defense secrets and installations from foreign espionage and sabotage." 394 U.S. at 314. Of course, all of these definitions encompass saboteurs and spies, not domestic political groups.[5] Nor can petitioner draw support from district court rulings. Both *United States v. Stone,* 305 F.Supp. 75 (D.D.C. 1969) and *United States v. O'Baugh,* 304 F.Supp. 767 (D.D.C. 1969) involved *foreign intelligence* wiretaps installed *before* the 1967 Opinion in *Katz.*

In April, 1969, the Solocitor General advised petitioner that a wiretap of an individual or organization which had no foreign intelligence information and which was not necessary for the protection of national defense secrets and installations from foreign espionage and sabotage was indefensible under the Supreme Court's rulings.

It could be argued that such power extends to the protection of the national security from internal subver-

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[5]Justices Douglas and Brennan were of the view that there was *no* national security exception under the Fourth Amendment's warrant requirement. *Katz, supra* at 359-360.

> sion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [deleted] or other subversive organizations. *I believe, however, that any attempt to sustain such surveillance would be disastrous. Not only would we not prevail on the particular facts presented* but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant. (Emphasis added).

Under these circumstances, no qualified immunity can be claimed by respondent.

3. Petitioner is not entitled to absolute immunity.[6] In *Harlow,* the Court rejected the claim made by chief aides of the President that they were entitled to derivative Presidential immunity. The Court stated at 2734:

> If the President's aides are derivatively immune because essential to the functioning of the Presidency, so should be members of the Cabinet—Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself—be absolutely immune. Yet we implicity rejected such derivative immunity in *Butz.*

The Court "assumed" that some Presidential aides could be assigned to act as Presidential "alter-egos," but only in those rare situations where the "exercise of functions for which absolute immunity is '*essential* for the conduct of the public business . . .'" *Id.,* at 2735, n. 19. (Emphasis added). Petitioner's claim to immunity under

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[6]On appeal from the denial of petitioner's first motion for summary judgment, the Court of Appeals concluded that he was not entitled to absolute immunity under *Butz v. Economou,* and this Court denied a petition for writ of certiorari raising the same issue now sought to be raised by petitioner. 452 U.S. 713 (1981).

this dictum is no less undifferentiated than his claim to derivative immunity. The Attorney General has a wide variety of important duties and responsibilities but, absent a showing that they involve a quasi-judicial function, they are not grounds for absolute immunity. Currently, of course, there is absolutely no question but that the warrantless surveillances conducted by petitioner are illegal. *United States v. United States District Court,* 407 U.S. 297 (1972) ("Keith"); Title III, 18 U.S.C. §§ 2510-2520; Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801, 1810. Thus, if his claim is upheld, high governmental officials could with absolute immunity engage in unlawful warrantless surveillances. The *Butz* and *Harlow* emphasis on "public policy," *Harlow, supra* at 2736 n.20, can hardly support such a result.

In *Butz v. Economou, supra* at 505-06, the Court stated:

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct projects—including some which may infringe such important personal interests as liberty, property, and free speech . . . Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Petitioner attempts to draw an analogy between the Attorney General's authorization of domestic security surveillances and Presidential decision-making and judgments

in highly sensitive areas of military policy and foreign affairs. Whatever force that argument would have if this case presented the entirely different question of a Governmental official acting under direct delegation of power to decide important foreign policy or military matters, it is simply of no consequence in this case where the issue is the decision to forego the Fourth Amendment's warrant requirement in a wholly domestic investigation.

The attempt to broaden the Executive's prerogatives in the military/foreign affairs area to include all "national security" matters was emphatically repudiated in *Keith*. *Keith* mandates close judicial scrutiny of Executive decision-making in this area and by its explicit terms forecloses the claim to absolute immunity.

## CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

*v.*

KEITH FORSYTH

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY MEMORANDUM FOR THE PETITIONER

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**REPLY MEMORANDUM FOR THE PETITIONER**

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1. Respondent has offered no serious reasons why this Court should not resolve the question whether the denial of a qualified immunity claim in a *Bivens* suit is immediately appealable under the collateral order doctrine. On the contrary, he concedes (Br. in Opp. 6 n.2) that there is a conflict in the circuits on this question[1], and he does not dispute the practical importance of this issue. Indeed, by claiming that a "qualified immunity defense * * * is * * * asserted by virtually every defendant in civil rights cases" (Br. in Opp. 4), respondent dramatizes the need for prompt review by this Court.

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[1]In addition to the cases cited in the petition at 9 & n.6, see *England* v. *Rockefeller*, Nos. 83-1851 (L), 83-1852, 83-1853, 83-1854 (4th Cir. July 16, 1984).

Respondent argues (Br. in Opp. 6) that this is not an appropriate case for considering the question because the only remaining issue in the case is damages and therefore an interlocutory appeal will not save any trial time. However, as the court of appeals noted (Pet. App. 34a), resolution of respondent's request for punitive damages may involve an "inquiry into the circumstances surrounding the defendant's activities, his subjective intent, and the presence or absence of malice" that would be "as searching as the trial on the merits would have been." Moreover, if the issue of appealability is not promptly resolved, trial time may be wasted in other cases.[2]

2. Respondent attempts to show (Br. in Opp. 7-10) that the illegality of warrantless domestic national security electronic surveillance was clearly established at the time of the wiretaps in question here, which antedated *United States* v. *United States District Court (Keith)*, 407 U.S. 297 (1972). But respondent understandably ignores this Court's unequivocal recognition in *Keith*, 407 U.S. at 299, 309, that it was confronting this issue "for the first time" in that case and that the issue previously had been "left open by *Katz* [v. *United States*, 389 U.S. 347, 358 n.23 (1967)]."[3] Respondent

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[2]Respondent also argues (Br. in Opp. 6) that review is inappropriate because this case involves a claim for damages under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, which is not subject to interlocutory review. This Court, however, already has ruled that Title III "simply did not legislate with respect to national security surveillances." *United States* v. *United States District Court*, 407 U.S. 297, 306 (1972); see also 18 U.S.C.(1976 ed.) 2511(3); see also the discussion of this issue in the Brief for the Respondent at 17-18, in *Zweibon* v. *Mitchell*, cert. denied, No. 83-2005 (Oct. 9, 1984).

[3]Because *Keith* itself involved a *domestic* security surveillance, these statements by the Court necessarily are dispositive of respondent's attempt by "polling" individual Justices of the Court on the basis of their separate opinions in different cases, to show that *Katz*, at best reserved decision on the question of the lawfulness of warrantless

likewise ignores the inconvenient fact that at the time of the wiretaps at issue here, the only two federal courts that had considered the constitutionality of warrantless domestic security surveillances had both found them to be within the President's authority. See *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970); *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), cited at Pet. App. 23a.[4]

Finally, respondent ignores the substantial and (except for the decision in this case, unanimous) lower court authority holding in cases involving petitioner that the illegality of warrantless domestic national security wiretaps was not clearly established or even foreshadowed at the time relevant here.[5] See cases cited Pet. 14; see also *Smith* v. *Nixon*,

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*foreign* national security surveillances (see Br. in Opp. 8-9). See also *Zweibon* v. *Mitchell (Zweibon IV)*, 720 F.2d 162, 172 (D.C. Cir. 1983), cert. denied, No. 83-2005 (Oct. 9, 1984) (noting with regard to a similar argument: "Even ignoring the inherent difficulties and imprecision that must attend any 'vote' based on statements made in other decisional contexts, appellants' 'poll' proves nothing, since it applies a different test from that expounded in *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)]. The test for qualified immunity is 'clearly established,' not 'clearly foreshadowed.' The distinction is self-evident.").

[4]In arguing that "petitioner [cannot] draw support from district court rulings," respondent inexplicably ignores the *O'Neal* and *Dellinger* decisions and instead cites two other decisions, which respondent then distinguishes on the ground that they involved foreign security surveillances (see Br. in Opp. 9). Even this distinction is not well founded, however, since, prior to *Keith*, decisions sustaining the President's electronic surveillance authority in the foreign security area reasonably were perceived as providing support for the exercise of similar authority in situations involving threats to domestic security. See, *e.g.*, *United States* v. *United States District Court*, 444 F.2d 651, 674-676 (6th Cir. 1971) (Weick, J., dissenting), aff'd, 407 U.S. 297 (1972).

[5]Respondent selectively cites (Br. in Opp. 9-10) just one of the diverse memoranda petitioner received as Attorney General on the constitutional questions involved in national security wiretaps. However, as the court of appeals in *Zweibon IV* noted with respect to a similar argument (720 F.2d at 171):

582 F. Supp. 709 (D.D.C. 1984); *Halperin* v. *Kissinger*, 578 F. Supp. 231 (D.D.C. 1984); *Ellsberg* v. *Mitchell*, Civ. No. 1879-72 (D.D.C. July 22, 1983). How many more times must petitioner litigate this precise question?

3. Respondent's brief in opposition also ignores what is most relevant in addressing the issue of absolute immunity. This Court has already stated that "[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interests." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 812 (1982) (footnote omitted). The importance of this question seems manifest, and respondent has not provided a single reason why it should not be reviewed here.

Respondent argues (Br. in Opp. 11) that petitioner's claim is "undifferentiated." On the contrary, however, it is quite specifically restricted to decisions in the field on national security and foreign policy.

Respondent contends (Br. in Opp. 11) that the Attorney General has absolute immunity only when he acts in a "quasi-judicial" capacity. But while this Court has held that Cabinet officers do not enjoy absolute immunity for all of their actions (*Butz* v. *Economou*, 438 U.S. 478 (1978)), the

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> [O]ur reading of the internal memoranda discloses that they make predictions as to future action by the Supreme Court and discuss strategic considerations for potential litigation; the memoranda do not purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance.

Perhaps more importantly, respondent's citation to such materials illustrates how requiring discovery and testimony of "an official's professional colleagues" can chill the exchange of candid views within a department and "be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817 (footnotes omitted).

Court has never held that the Attorney General's absolute immunity is limited to his quasi-judicial functions.

Respondent objects to absolute immunity (Br. in Opp. 11) because the potential for personal liability deters illegality. However, assuming that absolute immunity is not to be eliminated entirely, respondent's general objection does not speak to the question relevant here, *i.e.*, whether in the sensitive area of national security and foreign policy, the adverse effects of personal damages actions justify whatever beneficial deterrence such suits may have.[6]

Respondent closes (Br. in Opp. 12) with the extraordinary claim that "*Keith* * * * by its explicit terms forecloses the claim to absolute immunity." It suffices to say that *Keith*, a criminal case, no more settled the absolute immunity issue than the pre-*Keith* decisions clearly established the illegality of the wiretaps in this case.

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
*Solicitor General*

OCTOBER 1984

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[6]Needless to say, there are other deterrents against official misconduct, including dismissal, impeachment, criminal prosecution, congressional inquiry and oversight, and, in the case of the Attorney General, professional discipline. See *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976).

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## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED AUGUST 31, 1984**
**CERTIORARI GRANTED OCTOBER 29, 1984**

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UNITED STATES DISTRICT COURT

C.A. 72-1920

KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, L. PATRICK GRAY, 3RD, INDIVIDUALLY AND AS ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JOHN N. MITCHELL, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND ALBERT COOPER AND DAVID PORTER

**CIVIL DOCKET**

| Date | | Proceedings |
|---|---|---|
| 1972 | | |
| 1 | Sept 27 | Complaint filed. |
| | Sept 27 | Summons exit. |
| 2 | Nov. 29 | Defts' motion to stay proceedings, notice and memorandum in support thereof, filed. |
| 3 | Dec. 20 | Order that defts' motion for stay of proceedings is GRANTED, and that defts. shall file their answer to the complaint 30 days after final judgment in United States vs. Anderson, Crim. 71-602, filed. (12-21-72 entered and copies mailed) |

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| 1973 | | |
| 4 | Feb. 9 | Summons returned "on 9-28-72 served L. Patrick Gray, 3d, John N. Mitchell, and U.S. Attorney General by registered mail; on 10-2-72 served U.S. Attorney; and *unserved* as to John Doe and Richard Doe" and filed. |
| 5 | June 19 | Answer filed. |
| | June 19 | CASE LISTED FOR TRIAL. |
| 6 | Jul. 19 | Plff's interrogatories to defts., filed. |
| 7 | Aug. 10 | Defts' objections to plff's interrogatories, filed. |
| 9 | Oct. 25 | Plff's motion to compel answers to interrogatories, notice & memorandum in support thereof, filed. |
| 10 | Nov. 26 | Deft's opposition to plff's motion to compel answers to interrogatories, filed. |
| 1974 | | |
| 11 | June 13 | Appearance of Jack Levine Esq. for Plffs. filed. |
| 12 | Sep. 13 | Plff's reply memo in support of motion to compel answers to interr., filed. |
| 13 | Sep. 17 | Order that defts. shall file for an in camera inspection full and complete answers to the interr. of plff. within 30 days of the date of this order etc., filed.<br>9/18/74 entered and copies mailed. |
| 14 | Sept. 19 | Appearance of Jack J. Levine, Esq. for Plff., filed. |
| 15 | Oct. 4 | Pre-Trial Order Broderick, J. fixing trial for 1/29/75 at 9:30 A.M., filed<br>10/7/74 entered and copies mailed |
| 16 | Oct. 16 | Defts. motion for partial relief from order of 9-16-74, notice, and memorandum, filed. |
| 1975 | | |
| 17 | Feb. 4 | Pre-Trial Order Broderick, J. and fixing trial for 5/19/75 at 9:30 A.M., filed<br>2/5/75 entered and copies mailed |

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| 18 | May 23 | ORDER fixing 5/29/75 at 3:00 P.M. in Court chambers, Rm. 5008 for an in camera hearing etc., filed<br>5/27/75 entered and copies mailed |
| 20 | Jul 9 | Plff's Second Set of Interrogatories to defts', filed |
| 1975 | | |
| 21 | Jul 28 | ORDER that all discovery in this matter be completed by 10/31/75 etc. and trial shall commence during the month of December 1975, filed<br>7/29/75 entered and copies mailed |
| 23 | Sept 12 | Defts' Notice of In Camera Submission, filed |
| 25 | Sept 24 | Plff's notice of taking the deposition of John N. Mitchell, filed |
| 26 | Nov 20 | Plff's praecipe for the issuance of an Alias Summons as to Albert Cooper (John Doe) and E. Davis Porter (Richard Roe), filed |
| | Nov 20 | ALIAS SUMMONS EXIT |
| 27 | Nov 26 | ORDER that the deposition of John N. Mitchell be delivered to David Rudovsky, Esq. etc., filed<br>11-28-75 entered and copies mailed |
| 28 | Dec 9 | ORDER that all discovery in this matter be completed by 12-15-75 etc.; Trial shall commence during the month of January and this Order supersedes the Court's Order of 7-25-75, filed<br>12-10-75 entered and copies mailed |
| 29 | Dec 10 | ALIAS SUMMONS returned 11-26-75 served Albert Cooper (John Doe) and E. Davis Porter (Richard Roe), filed |
| 30 | Dec 22 | Defts' Notice of In Camera Submission, filed |
| 31 | Dec 29 | Report of Settlement Conference Broderick, J., filed |

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| 32 | Dec 29 | ORDER that both parties in this action will file cross-motions for summary judgment etc., filed<br>12-30-75 entered and copies mailed |
| 33 | Dec 30 | Stipulation and Order substituting Albert Cooper and David Porter for John Doe and Richard Roe etc., filed |
| 34 | Dec 30 | Stipulation and Order extending time to and including 1-16-76 for defts to respond to plff's Third Set of Interrogatories and Request for Production of Documents, filed |
| 1976 | | |
| 35 | Feb. 11 | Govt's notice of In Camera Submission with Certificate of Service, filed |
| 36 | Mar. 2 | Stipulation and Order as to Plff's Damages, filed |
| 37 | Mar. 10 | Appearance of Jack J. Levine, Esq. as counsel for Plff., filed. |
| 38 | Mar. 19 | Defts' Motion for Summary Judgment, Certificate of Service, Statement of Material Facts as to which there is no genuine issue and Memorandum in support thereof, filed |
| 39 | Mar. 29 | Defts' Notice of In Camera Submission, filed |
| 40 | Apr. 22 | Plff's Cross-Motion for Summary Judgment and Response to defts' Statement of Material Facts as to which there is no Genuine Issue, filed |
| 43 | Jul. 6 | Defts notice of filing response to plff's cross-motion for summary judgment in camera on July 6th, 1976, filed |
| 44 | Jul 8 | Appearance of Jonathan M. Hyman Esq for plff., Keith Forsyth, filed. |
| 45 | Jul 16 | Supplemental to Memorandum in support of defts' Motion for Summary Judgment—IMMUNITY, filed |

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| 46 | Jul 26 | Stipulation and Order dtd. 7-23-76 that the oral Protective Order entered on 5-29-75 be modified etc., filed |
| | Aug 2 | Stipulation and Order that the following documents be made party of the record in C.A. 74-826: 1. Deposition Transcript of John N. Mitchell, 10-23-75, Washington, D.C.; 2. Plff's Third Set of Interrogatories to defts and Request for Production of Documents and 3. defts' Response In Camera to Plff's Third Set of Interrogatories to defts and Request for Production of Documents, filed (C.A. 74-826) |
| 47 | Sept 10 | Deft's Notice of In Camera submission, filed |
| 1977 | | |
| 48 | Mar 22 | Govt's Notice of In Camera Submission, filed |
| 49 | Mar 28 | Plff's Notice of In Camera Submission, filed |
| 50 | Oct 12 | Memorandum on Recent Decision in support of defts' Motion for Summary Judgment, filed |
| 1978 | | |
| 51 | Feb 14 | MEMORANDUM BRODERICK, J. & ORDER that defts' motion for summary judgment and the plff's cross-motion for summary judgment are DENIED; that plff's claims under 47 U.S.C. § 605 and the Sixth Amendment are DISMISSED and the plff's claims against Richard G. Kleindienst and L. Patrick Gray, 3rd. are DISMISSED, filed<br>2/15/78 ENTERED & COPIES MAILED |

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| 52 | Mar 13 | ORDER that the ten-day period prescribed by Rule 37 of the Rules of Civil Procedure of this Court shall be enlarged to and including 3/17/78, to permit defts to move for reconsideration of the Memorandum and Order entered in this case on 2/15/78 etc., filed<br>3/14/78 ENTERED & COPIES MAILED |
| 53 | Mar 27 | Defts' Motion for Reconsideration of its Memorandum Opinion and Order dtd. 2/15/78 or in the alternative for Certification and Memorandum in Support thereof, filed |
| 54 | Apr 17 | NOTICE OF APPEAL OF THE DEFTS RECEIVED 4/17/78 AT 3:00 P.M., FILED 4/18/78 COPIES TO: David Rudovsky, Esq., David Kairys, Esq., Jonathan M. Hyman, Esq. Barbara Allen Babcock, Esq., Barbara B. O'Malley, Esq., Gordon W. Daiger, Esq., Edward S. Christenbury, Esq., Benjamin C. Flannagan, Esq. Wm. R. Hollifield, Esq. and U.S.C.A. |
| 55 | Apr 17 | COPY OF CLERK'S NOTICE TO U.S. COURT OF APPEALS, FILED |
| 56 | May 8 | Original record transmitted to U.S.C.A. (Papers #50, 51 not included) (U.S.C.A. No. 78-1611) |
| 58 | July 7 | Defts' supplemental memorandum in support of defts' motion for reconsideration, filed. |
| 59 | Sept 5 | Certified copy of Order received from U.S. Court of Appeals GRANTING Motion by appellants in NO. 78-1847 for stay of District Court Proceedings etc. pending disposition of appeal etc., filed |

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| 60 | Nov 6 | Plff's Reply to defts' Second Supplemental Memorandum and Notice of In Camera Submission, filed (IN CAMERA DOCUMENT) |
| 61 | Nov 6 | Supplemental Memorandum (IN CAMERA) in support of defts' Motion for Summary Judgment and Notice of In Camera Submission, filed |
| 62 | Nov 6 | Defts' Second Supplemental Memorandum (IN CAMERA) in support of their Motion for Summary Judgment, filed (IN CAMERA) |
| 63 | Nov 6 | TRANSCRIPT OF DEPOSITION OF JOHN N. MITCHELL, FILED (IN CAMERA) |
| 64 | Nov 6 | Defts' Response IN CAMERA to plff's Third Set of Interrogatories and Request for Production of Documents, filed (IN CAMERA) |
| 65 | Nov 6 | Supplement (IN CAMERA) to defts' answers to plff's interrogtories filed for IN CAMERA inspection pursuant to the Court's Order of 9/16/74 with Certificate of Service, filed (IN CAMERA) |
| 66 | Nov 6 | Plff's Cross-Motion for Summary Judgment, Plff's Response to defts' Material Facts as to which there is No Genuine Issue and Memorandum of Law in Support of Plff's Cross-Motion for Summary Judgment, filed (IN CAMERA) |
| 67 | Nov 6 | Page 11 of defts' objections to plff's interrogatories etc. filed (IN CAMERA), filed |
| 68 | Nov 6 | Defts' Answers to plff's interrogatories filed for IN CAMERA Inspection pursuant to the court's Order of 9/16/74, filed |

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| 69 | Nov 6 | Defts' Answers, IN CAMERA, to plff's Second Set of Interrogatories, filed (IN CAMERA) |
| | Nov 6 | FIRST SUPPLEMENTAL RECORD TRANSMITTED TO USCA (Documents 60 thru 69 Inclusive filed IN CAMERA; Documents 58 & 59 NOT INCLUDED) |
| | Nov 14 | SECOND SUPPLEMENTAL RECORD TRANSMITTED TO U.S. COURT OF APPEALS (PAPER NOS. 50 & 51) (USCA No. 78-1611) |
| 1979 | | |
| 70 | Aug 13 | Plff's Memorandum of Law in opposition to defts' Motion for Reconsideration or in the alternative for Certification, filed |
| 71 | Sept 5 | Certified copy of Judgment in Lieu of formal mandate received from U.S. Court of Appeals that the Orders of the District Court filed Feb. 14, 1978 and March 22, 1978 are Affirmed insofar as the issue of derivative absolute immunity is concerned, and the causes be, and the same are hereby remanded to the District Court for further proceedings etc., filed |
| | Sept 5 | RECORD ON APPEAL RETURNED. |
| 1981 | | |
| 72 | Mar 24 | ORDER PLACING THIS CASE INTO THE CIVIL SUSPENSE FILE—SUPREME COURT HAS GRANTED CERT; PARTIES ARE AWAITING COURT'S DECISION IN KISSINGER V. HALPERN ARGUED 12/8/80, FILED 3/24/81 ENTERED & COPIES MAILED |
| 73 | Nov 5 | Report of Pretrial Conference Broderick, J., filed |

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| 74 | Nov 13 | ORDER DTD. 11/13/81 THAT A HEARING SHALL BE HELD ON 12/11/81 AT 9:30 A.M. IN COURTROOM 10-B FOR THE PURPOSE OF DETERMINING WHETHER THE ATTORNEY GENERAL AUTHORIZED THE WIRETAPS IN THIS CASE FOR THE PURPOSE OF OBTAINING INFORMATION TO INITIATE A CRIMINAL PROSECUTION, FILED<br>11/16/81 ENTERED & COPIES MAILED |
| 75 | Dec 2 | ORDER DTD. 12/1/81 THAT THE HEARING PREVIOUSLY SCHEDULED FOR 12/11/81 IS RESCHEDULED TO 1/8/82 AT 9:30 A.M. IN COURTROOM 10-B, FILED<br>12/2/81 ENTERED & COPIES MAILED |
| 1982 | | |
| 76 | Jan 5 | Defts' prehearing memorandum on applicable law following remand, filed |
| 77 | Jan 6 | Govt's Exhibits G-1, 2, 3 & 4, filed (FILED UNDER SEAL) |
| 78 | Jan 8 | HEARING RE: Authorization of Wiretaps to determine purpose of obtaining information; Mr. Rudovsky to submit brief within next several days etc., filed |
| (77) | Feb 4 | ORDER THAT GOVT'S EXHIBITS ARE SEALED & IMPOUNDED, FILED<br>2/5/82 ENTERED & COPIES TO COUNSEL (PLACED IN LOCK-UP—CABINET NO. 1) |
| 79 | Jul 20 | Supplement to defts' prehearing memorandum on applicable law following remand, file |

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| 80 | Nov. 12 | MEMORANDUM AND ORDER THAT PLFF'S. MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY ONLY OF JOHN MITCHELL IS GRANTED. DEFTS. MOTION FOR SUMMARY JUDGMENT IS DENIED. TRIAL WILL BE HELD ON 12/15/82—FOR PURPOSE OF DETERMINING THE LIABILITY OF DEFTS. ALBERT COOPER AND DAVID PORTER, FBI AGENTS WHO CONDUCTED THE ELECTRONIC SURVEILLANCE AT ISSUE IN THIS CASE, FILED. 11/12/82 Entered & copies mailed |
| 81 | Nov 24 | DEFTS' MOTION FOR CERTIFICATION AND FOR A STAY, MEMORANDUM IN SUPPORT, CERTIFICATE OF SERVICE, FILED. |
| 82 | Dec. 2 | Plff's memorandum of law in opposition to defts' motion for certification and a stay, filed. |

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| 83 | Dec. 3 | MEMORANDUM, BRODERICK, J., AND ORDER THAT THE MOTION FOR CERTIFICATION FILED BY DEFTS, JOHN MITCHELL, ALBERT COOPER AND DAVID PORTER IS DENIED, THE MOTION FOR A STAY OF PROCEEDINGS PENDING CERTIFICATION FOR INTERLOCUTORY APPEAL IS DENIED, TRIAL IN THIS MATTER FOR THE PURPOSE OF DETERMINING THE LIABILITY OF DEFTS, ALBERT COOPER, ET AL, THE FBI AGENTS WHO CONDUCTED THE ELECTRONIC SURVEILLANCE AT ISSUE IN THIS CASE, AND FOR THE PURPOSE OF DETERMINING DAMAGES SUFFERED BY PLFF IS RESCHEDULED FOR 1-14-83 AT 9:30 A.M. IN COURTROOM 10-B U.S. COURTHOUSE, FILED.<br>12-6-82 Entered and copies mailed. |
| 84 | Dec. 10 | MEMORANDUM, BRODERICK, J., AND ORDER, DATED 12-9-82, THAT THE PARTIES SHALL SUBMIT TO THIS COURT ON OR BEFORE 1-8-82 THEIR BRIEFS REGARDING THE APPLICABILITY OF TITLE III OF THE OMNIBUS CRIME CONTROL ACT OF 1968, TO DETERMINE THE DAMAGES AT ISSUE IN THIS LITIGATION AND, IF TITLE III IS NOT APPLICABLE, THE LAW THIS COURT SHOULD APPLY IN ASSESSING PLFF'S DAMAGES, FILED.<br>12-13-82 Entered and copies mailed. |

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| 85 | Dec. 13 | Defts' notice of appeal, filed.<br>12-14-82 Copies to: David Rudovsky, Esq., Jonathan M. Hyman, Esq. (USCA 82-1812) |
| 86 | Dec. 13 | Copy of Clerk's notice to U.S. Court of Appeals, filed. |
| 87 | Dec. 13 | Defts' notice of deposition of Keith Forsyth, filed. |
| 88 | Dec. 23 | ORDER THAT THE TRIAL SCHEDULED FOR 1-14-83 IS RESCHEDULED FOR 1-24-83 AT 10:00 A.M. IN COURTROOM NO. 10-B, THE PARTIES SHALL SUBMIT THEIR BRIEFS REGARDING THE APPLICABILITY OF TITLE III OF THE OMNIBUS CRIME CONTROL ACT ON OR BEFORE 1-17-83, FILED.<br>12-23-82 Entered and copies mailed. |
| 89 | Dec. 27 | Copy of Appellant's transcript purchase order, filed. |
| 1983 | | |
| 90 | Jan. 3 | STIPULATION AND ORDER THAT THIS ACTION AND ALL CLAIMS ASSERTED THEREIN SHALL BE DISMISSED WITH PREJUDICE AS TO DEFTS, ALBERT COOPER AND E. DAVIS PORTER, EACH SIDE TO BEAR ITS OWN COSTS, FILED.<br>1-4-83 Entered and copies mailed. |
| 91 | Jan. 18 | ORDER THAT TRIAL OF THIS MATTER IS CONTINUED INDEFINITELY PENDING DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AS TO APPEALABILITY OF THIS COURT'S ORDER OF NOVEMBER 12, 1982, FILED.<br>1/19/83 Entered and copies mailed. |

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| 92 | Jan. 21 | CERTIFIED COPY OF ORDER FROM U.S. COURT OF APPEALS THAT THE DEFT'S MOTION FOR A STAY IS GRANTED; THE MOTION TO DISMISS THE APPEAL FROM DENIAL OF ABSOLUTE IMMUNITY IS DENIED, THE MOTION TO DISMISS THE APPEAL FROM THE DENIAL OF QUALIFIED IMMUNITY IS REFERRED TO THE MERITS PANEL, FILED. 1/21/83 entered |
| 93 | Feb. 9 | Transcript of testimony of 1-8-82, filed. |
| | Feb. 9 | RECORD COMPLETE FOR PURPOSES OF APPEAL. |

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Docket No. 82-1812
Related Case 83-3150

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KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, L. PATRICK GRAY, 3RD, INDIVIDUALLY AND AS ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JOHN N. MITCHELL, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF THE UNITED STATES, JOHN DOE AND RICHARD ROE, ALBERT COOPER AND DAVID PORTER

JOHN N. MITCHELL, ALBERT COOPER, AND DAVID PORTER, APPELLANTS

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| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1983 | |
| Jan. 3 | Motion by appee., Keith Forsyth, to dismiss appeal or in the alternative to allow proceedings on damages to continue in the district court, filed. |
| Jan. 10 | Motion by aplt., John N. Mitchell, to stay trial scheduled by the district court to commence 1/24/83, with memorandum in support of aplt's motion to stay trial, *and* opposition to appee's motion to dismiss appeal, filed |
| Jan. 10 | Submitted on above motions. Coram: |
| Jan. 14 | Letter dated 1/12/83, from David Rudovsky, Esq., in response to aplt's motion to stay trial scheduled by the D.C., rec'd for the info. of the Court. |

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| Jan. 20 | Opinion Sur Grant of Stay (*Weis*, Sloviter and Becker) with separate dissenting opinion by Judge Sloviter, filed. Send to merits. |
| Jan. 20 | Order (*Weis*, Sloviter and Becker, C.J.s.) granting defendant's motion for a stay; denying motion to dismiss the appeal from the denial of absolute immunity and referring the motion to dismiss the appeal from the denial of qualified immunity to the merits panel, filed. Send to merits. |
| Mar. 23 | Statement by applt. of previous appeals purs. to Third Circuit Rule 21(1)(A)(d), filed. Send to merits panel. |
| Mar. 28 | Motion by applt. to file corrected brief, w/svc., filed. |
| Mar. 30 | Order (Clerk) granting above mot., filed. |
| Sept. 9 | Letter dated 9/7/83, from Larry L. Gregg, Esq., counsel for applt.-pet., w/enclosures, rec'd for the info. of the Ct., filed. (Cvs. 82-1812 & 83-3150) |
| Mar. 25 | Submitted on pet. for writ of mandamus. Coram: Hunter & Sloviter, C.J., and Gerry, D.J.) |
| Apr. 8 | Order (*Hunter* and Sloviter, C.J., and Gerry, D.J.) consolidating pet. at 83-3150 w/appeal at 82-1812 and referring to the merits panel, filed. Send to merits. |
| Sept. 16 | Ltr dated 9/14/83 from David Rudovsky, Esq., cnsel for applee, Forsyth, rec'd for the Court's info. (Cvs. 82-1812 & 83-3150) |
| Sept. 13 | Court requested at oral argmt. counsel to have transcript of oral argmt. prepared (Cvs. 82-1812 & 83-3150) |
| Sept. 23 | Copy of transcript of tape of oral argmt. held 9/13/83, rec'd at the dir. of the Court. (Cvs. 82-1812 & 83-3150) |
| Oct. 24 | Ltr dated 10/21/83 from Larry L. Gregg, Esq., cnsel for applts, w/encl., recd. for the Court's info. (Cvs. 83-1812 and 83-3150) |

Dec. 22 Ltr dtd 12/19/83 from Larry L. Gregg, Esq., cnsel for applts, w/encl., recd for the Crt's info. (Cvs. 82-1812 & 83-3150)

1984

Apr. 3 Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Hunter, Weis, Garth, *Higginbotham*, Sloviter and Becker, C.Js.) denying petition for rehrng. in banc. Judge Adams would grant rehrng. in banc because he believes the issues raised by the appeal are of sufficient importance to command the attention of the full court. Judge Hunter, Judge Weis and Judge Garth would grant the pet. for rehrng. (Cvs. 82-1812 & 83-3150)

Apr. 23 Motion by appellant-petitioner, John N. Mitchell to recall the mandate and stay the mandate pending application for certiorari, filed. (Cvs. 82-1812 and 83-3150)

May 8 Order (Weis, Higginbotham & Sloviter, C.Js.) recall the certified judgment in lieu of formal mandate, filed. (Cvs. 82-1812 & 83-3150)

June 1 Motion by appellant to extend stay of the mandate pending application for cert., w/serv., filed (Cvs. 82-1812 & 83-3150)

June 14 Order (Higginbotham, C.J.) granting further stay of mandate until 7-2-84, filed

June 27 Motion to extend stay of the mandate pending application for certiorari, w/serv., (Cvs. 82-1812 & 83-3150)

June 27 Letter dated 6-25-84 rec'd from S.C. advising that an order extending time in which to file pet. for cert. to and including 8/31/84 was filed, rec'd for info of (Cvs. 82-1812 & 83-3150)

June 29 Letter dated June 28, 1984 rec'd from Gordon W. Daiger, Esquire. (Cvs. 82-1812 and 83-3150)

July 6 Order (Higginbotham, C.J.) granting further stay of mandate until 8-31-84, filed (Cvs. 82-1812 & 83-3150)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Docket No. 83-3150
Related Case 82-1812

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KEITH FORSYTH, PLAINTIFF-RESPONDENT
HON. RAYMOND J. BRODERICK,
UNITED STATES DISTRICT JUDGE, NOMINAL RESPONDENT

*v.*

RICHARD G. KLEINDIENST, ET AL., DEFENDANTS
JOHN N. MITCHELL, DEFENDANT-PETITIONER

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| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1983 | |
| Mar. 25 | Submitted on petition for writ of mandamus. Coram: Hunter and Sloviter, C.J. and Gerry, D.J. |
| Apr. 8 | Order (*Hunter* and Sloviter, C.J., and Gerry, D.J.) consolidating petition at 83-3150 with the appeal at 82-1812 and referring to the merits panel, filed. Send to merits. |
| Sept. 9 | Letter dated 9/7/83, from Larry L. Gregg, Esq., counsel for applt-pet., w/enclosures, rec'd for the info. of the Ct., filed (Cvs. 82-1812 & 83-3150) |
| Sept. 16 | Letter dated 9/14/83 from David Rudovsky, Esq., counsel for applee, Forsyth, rec'd for the info. of the Ct. (Cvs. 82-1812 & 83-3150) |
| Sept. 13 | Court requested at oral argmt. counsel to have transcript of oral argmt. prepared. (Cvs. 82-1812 & 83-3150) |
| Sept. 23 | Copy of transcript of tape of oral argmt. held 9/13/83, rec'd at the dir. of the Court at oral argmt. (Cvs. 82-1812 & 83-3150) |
| Oct. 24 | Ltr dated 10/21/83 from cnsel for pet., w/encl., recd. for the Court's info. (Cvs. 82-1812 and 83-3150) |

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| Dec. 22 | Ltr dtd 12/19/83 from Larry L. Gregg, Esq, ensel for pet, w/encl., recd for the Crt's info. (Cvs. 82-1812 & 83-3150) |
| 1984 | |
| Apr. 3 | Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Hunter, Weis, Garth, *Higginbotham*, Sloviter and Becker, C.Js.) denying petition for rhrng. in banc. Judge Adams would grant rhrng. in banc because he believes the issues raised by the appeal are of sufficient importance to command the attention of the full court. Judge Hunter, Judge Weis and Judge Garth would grant the pet. for rehrng. (Cvs. 82-1812 & 83-3150) |
| Apr. 23 | Motion by appellant-petitioner, John N. Mitchell to recall the mandate and stay the mandate pending application for certiorari, filed. (Cvs. 82-1812 and 83-3150) |
| May 8 | Order (Weis, *Higginbotham* & Sloviter, C.Js.) recalling the certified judgment in lieu of formal mandate, filed. (Cvs. 82-1812 & 83-3150) |
| June 1 | Motion by aplt. to extend stay of the mandate pending application for certiorari, w/serv., filed. (Cvs. 82-1812 & 83-3150) |
| June 14 | Order (Higginbotham, C.J.) granting further stay of mandate to 7-2-84, filed. |
| June 27 | Motion to extend stay of the mandate pending application for certiorari, w/serv., filed. (Cvs. 82-1812 & 83-3150) |
| June 27 | Letter dated 6-25-84 from S.C. advising that an order extending time in which to file pet. for cert. to and including 8-31-84 was filed, rec'd for info of Court. (Cvs. 82-1812 & 83-3150) |
| June 29 | Letter dated June 28, 1984 rec'd from Gordon W. Daiger, Esquire (Cvs. 82-1812 and 83-3150) |
| July 6 | Order (Higginbotham, C.J.) granting further stay of mandate to 8-31-84, filed (Cvs. 82-1812 & 83-3150) |

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1920

KEITH FORSYTH

*v.*

RICHARD G. KLEINDIENST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, L. PATRICK GRAY, 3RD, INDIVIDUALLY AND AS ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JOHN N. MITCHELL, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF THE UNITED STATES, JOHN DOE AND RICHARD ROE

**JURY TRIAL WAIVED**

**COMPLAINT**

1. This action is brought by plaintiff Keith Forsyth for compensatory and punitive damages occasioned by defendants' unauthorized and illegal electronic surveillance, overhearing, interception, use and disclosure of plaintiff's oral and wire communications in violation of plaintiff's rights to privacy, free speech, association, counsel and political expression.

**JURISDICTION**

2. This action arises under the First, Fourth, Sixth and Ninth Amendments to the Constitution of the United States and 28 U.S.C. § 2520. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and § 1343(4), 18 U.S.C. § 2520, 42 U.S.C. § 1985, 47 U.S.C. § 605 and the aforementioned constitutional provisions.

3. The matter in controversy, exclusive of interest and costs, exceeds the value of Ten Thousand Dollars ($10,000.00).

## PARTIES

4. Plaintiff Keith Forsyth is a citizen of the United States and resident of the Commonwealth of Pennsylvania.

5. Defendant Richard G. Kleindienst is the Attorney General of the United States and the executive head of the Department of Justice. He is sued individually and in his official capacity.

6. Defendant L. Patrick Gray, 3rd is Acting Director of the Federal Bureau of Investigation. He is sued individually and in his official capacity.

7. Defendant John N. Mitchell is a former Attorney General of the United States. He is sued individually and in his former official capacity.

8. John Doe and Richard Roe are unknown agents or employees of the defendants who, through illegal electronic surveillance intercepted, overheard, used and subsequently disclosed the wire and oral communications of plaintiff Forsyth.

## CAUSE OF ACTION

9. Plaintiff Keith Forsyth is a defendant in *United States of America* v. *Anderson, et al.* United States District Court for the District of New Jersey, Cr. No. 602-71. On March 15, 1972 plaintiff Forsyth, through his attorney, filed a Motion for Disclosure of Electronic Surveillance, etc., pursuant to 18 U.S.C. § 3504, requiring the Government to "affirm or deny the occurrence" of unlawful wiretapping or other electronic surveillance.

10. In response to this Motion the Government filed an Answer (Government's Opposition to Motion for Disclosure of Electronic Surveillance and a Pre-Trial Hearing to Suppress Evidence) which, in pertinent part, represented:

> "A review of the records of the Department of Justice has established that none of the movants in this matter were the subject of direct electronic surveillance, nor were any premises in which they had a proprietary interest. However, said defendants Robert Williamson and Keith Forsyth did participate in conversations that are unrelated to this case and which were overheard by the Federal Government during the course of

> electronic surveillance expressly authorized by the President acting through the Attorney General. Such surveillance was deemed necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. (18 U.S.C. 2511(3))." *govrnment's Opposition* at 2-3.

11. The Government also submitted an Affidavit of the Attorney General of the United States (defendant Kleindienst) asserting, *inter alia*, that "said electronic surveillance was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the national security as set forth in 18 U.S.C. 2511(3)." A copy of this affidavit is attached to this Complaint. (Exhibit "A")

12. Said electronic surveillance was in violation of federal law and the Constitution of the United States.

13. The defendants have disclosed and used the above described illegally intercepted oral communications and have procured their agents to intercept, disclose and use these oral and wire communications.

14. Upon information and belief the oral and wire communications intercepted by the defendants included communications with plaintiff's legal counsel.

15. Upon information and belief the oral and wire communications intercepted by the defendants were communications concerning political activity protected by the First Amendment.

16. The actions of the defendants, their agents and employees, and in particular their unauthorized and illegal electronic surveillance, overhearing, interception, use and disclosure of plaintiff's oral and wire communications, violated plaintiff's right to privacy under the Fourth and Ninth Amendments, his right to free speech, association and political expression under the First Amendment; his right to counsel under the Sixth Amendment and were in violation of plaintiff's rights under 18 U.S.C. §§ 2510-2520 and 47 U.S.C. § 605.

17. Said interceptions, overhearing, use and disclosure of plaintiff's oral and wire communications were not made in

good faith reliance on a court order or legislative authorization.

WHEREFORE, Plaintiff Forsyth respectfully requests the following relief:

1. A judgment in the amount of $100.00 a day for each day the defendants violated plaintiff's rights under Chapter 119, 18 U.S.C. or $1,00.00 whichever is higher, pursuant to 18 U.S.C. § 2520(a);

2. A judgment in the amount of $25,000.00 for the violation of plaintiff's rights under the First, Fourth, Sixth and Ninth Amendments.

3. Punitive damages in the amount of $50,000.00

4. Reasonable attorney's fees and other litigation costs reasonably incurred, pursuant to 18 U.S.C. § 2520(c).

5. Such other and further relief which may appear to be just and proper.

Respectfully submitted,

/s/ David Rudovsky

DAVID RUDOVSKY
DAVID KAIRYS
*Philadelphia Counsel for National Emergency Civil Liberties Committee*
*1427 Walnut Street*
*Philadelphia, Pa. 19102*

Of Counsel:

KAIRYS & RUDOVSKY
1427 Walnut St.
Philadelphia, Pa. 19102

SEPTEMBER 26, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 602-71

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

WILLIAM ANDERSON, ET AL., DEFENDANT

## AFFIDAVIT OF THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

RICHARD G. KLEINDIENST, being duly sworn deposes and says:

1. I am the Acting Attorney General of the United States.

2. I submit this affidavit in connection with the opposition of the United States of America to the disclosure to defendants Robert Williamson and Keith Forsyth of information concerning overhearings of their voices which occurred during the course of national security electronic surveillance. In addition to other pertinent information, the sealed exhibit submitted herewith for *in camera* inspection contains a description of the premises which were the subject of such electronic surveillance.

3. Said electronic surveillance was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the national security as set forth in 18 U.S.C. 2511(3). The authorization for such surveillance was in response to the request of the Director of the Federal Bureau of Investigation, which request was considered in conjunction with all of the foreign and domestic intelligence available to the Executive Branch of the Government.

4. I certify that it would be a practical impossibility to submit to the court all of the facts, circumstances, and other considerations upon which this authorization was

based. I further certify that it would prejudice the national interest to disclose the particular facts contained in the sealed exhibit and concerning the surveillance other than to the court, *in camera*.

5. I respectfully request the court to treat the contents of the sealed exhibit with the same dignity for security purposes as they were treated in submission to the court and to return said exhibit to the Department of Justice at the conclusion of its hearing on this matter. The Department of Justice will retain said exhibit under the seal of the court subject to any further orders of this court or other court of competent jurisdiction.

/s/ Richard G. Kleindienst
RICHARD G. KLEINDIENST
*Acting Attorney General*
*of the United States*

Subscribed and sworn to before B. Landsberger, Notary Public, on this 11th day of April, 1972.

My Commission expires June 30, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1920

KEITH FORSYTH, PLAINTIFF,

*v.*

RICHARD G. KLEINDIENST, ET AL., DEFENDANTS.

## ANSWER TO COMPLAINT

Defendants, by their undersigned attorneys, in answer to the Complaint herein filed, say:

### FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

### SECOND DEFENSE

The doctrine of sovereign immunity bars any suit against the United States where the United States has not consented to be sued. This suit is barred by the doctrine of sovereign immunity since it is in law and fact a suit against the United States to which the United States has not consented.

### THIRD DEFENSE

From January 20, 1969 to March 1, 1972 defendant John N. Mitchell was the Attorney General of the United States. On March 2, 1972 defendant Richard G. Kleindienst became the Acting Attorney General of the United States and between June 12, 1972 and May 25, 1973 was the Attorney General of the United States. On May 25, 1973 Elliot L. Richardson became the Attorney General of the United States. Until May 2, 1972 J. Edgar Hoover was the Director of the Federal Bureau of Investigation. Between May 3, 1972 and April 27, 1973 defendant L. Patrick Gray, III was the Acting Director of the Federal Bureau of Investigation.

On April 30, 1973 William D. Ruckelshaus became the Acting Director of the Federal Bureau of Investigation. All activities of the defendants in the premises were performed in furtherance of their official duties, were within the scope of their authority, and were not in excess of their statutory authority. The defendants are, therefore, absolutely immune from civil liability therefor under the doctrine of official immunity.

**FOURTH DEFENSE**

From January 20, 1969 to March 1, 1972 defendant John N. Mitchell was the Attorney General of the United States. On March 2, 1972 defendant Richard G. Kleindienst became Acting Attorney General of the United States and between June 12, 1972 and May 25, 1973 was the Attorney General of the United States. On May 25, 1973 Elliot L. Richardson became the Attorney General of the United States. Until May 2, 1972 J. Edgar Hoover was the Director of the Federal Bureau of Investigation. Between May 3, 1972 and April 27, 1973 defendant L. Patrick Gray, III was the Acting Director of the Federal Bureau of Investigation. On April 30, 1973 William D. Ruckelshaus became the Acting Director of the Federal Bureau of Investigation. All activities of the defendants in the premises were performed in furtherance of their official duties, were undertaken in good faith and in the reasonable belief that such activities were necessary, lawful, and within the scope of their authority. Defenants are, therefore, not liable to the plaintiff in damages for such activity.

**FIFTH DEFENSE**

The Court lacks jurisdiction over the subject matter of this action.

**SIXTH DEFENSE**

Answering specifically the allegations contained in the numbered paragraphs of the Complaint, the defendants aver:

1. Defendants admit that conversations of plaintiff were incidentally overheard on national security electronic surveillance of another conducted by the Federal Bureau of In-

vestigation which surveillance was authorized and approved by the then Attorney General of the United States, defendant John N. Mitchell, acting for the President of the United States, to gather intelligence information in the exercise of his authority relating to the national security as set forth in 18 U.S.C. § 2511(3). Defendants deny that any electronic surveillance was directed at the plaintiff or that such surveillance occurred on premises owned, leased or licensed by plaintiff. Defendants deny that defendants or their agents have in any manner disclosed or used said overheard conversations of the plaintiff. Defendants deny that any action has been taken by defendants or their agents against plaintiff which is actionable in a suit for violation of plaintiff's constitutional or other legal rights and further deny that plaintiff is entitled to judicial relief against defendants in any form or manner.

2. Defendants deny the allegations contained in the first sentence of paragraph 2 of the Complaint, and further deny that the Court has jurisdiction over this case under 28 U.S.C. §§ 1331, 1343(4), 18 U.S.C. § 2520, 42 U.S.C. § 1985, 47 U.S.C. § 605, the First, Fourth or Ninth Amendments to the Constitution of the United States, or otherwise.

3. Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Defendants admit that between June 12, 1972 and May 25, 1973 Richard G. Kleindienst was the Attorney General of the United States. Defendants deny that any action has been taken by defendant Kleindienst against plaintiff which is actionable in a suit for violation of his constitutional or other legal rights and further deny that plaintiff is entitled to judicial relief against him in any form or manner.

6. Defendants admit that between May 3, 1972 and April 27, 1973 L. Patrick Gray, III was the Acting Director of the Federal Bureau of Investigation. Defendants deny that any action has been taken by defendant Gray against plaintiff which is actionable in a suit for violation of his constitu-

tional or other legal rights and further deny that plaintiff is entitled to judicial relief against him in any form or manner.

7. Defendants admit that between January 20, 1969 and March 1, 1972 John N. Mitchell was the Attorney General of the United States. Defendants deny that any action has been taken by defendant Mitchell against plaintiff which is actionable in a suit for violation of his constitutional or other legal rights and further deny that plaintiff is entitled to judicial relief against him in any form or manner.

8. Defendants deny that any person acting at the behest of the defendants have taken any action against plaintiff which is actionable in a suit for violation of his constitutional or other legal rights.

9.-11. Defendants admit the allegations contained in paragraphs 9 through 11 of the Complaint.

12. Defendants deny the legal conclusions contained in paragraph 12 of the Complaint; and further deny that any action has been taken by defendants against plaintiff which is actionable in a suit for violation of plaintiff's constitutional or other legal rights.

13. Defendants deny the legal conclusions contained in paragraph 13 of the Complaint; and further deny that said defendants or their agents have in any manner disclosed or used any conversations of plaintiff incidentally overheard in the electronic surveillance of another authorized by the then Attorney General of the United States, defendant John N. Mitchell, acting for the President of the United States, to gather intelligence information in the exercise of his authority relating to the national security as set forth in 18 U.S.C. § 2511(3).

14.-15. Defendants deny the allegations contained in paragraphs 14 and 15 of the Complaint.

16. Defendants deny that any action has been taken by defendants against plaintiff which is actionable in a suit for violation of plaintiff's constitutional or other legal rights; and further deny that any person acting at the behest of the defendants has taken any action against plaintiff which is actionable in a suit for violation of his constitutional or

other legal rights. Accordingly, defendants deny the allegations contained in paragraph 16 of the Complaint.

17. Defendants admit that such surveillance was not conducted pursuant to a court order, but assert that such surveillance was conducted in a good faith reliance upon the legislative recognition of such authority set forth in 18 U.S.C. § 2511(3). Accordingly, defendants deny the remaining allegations contained in paragraph 17 of the Complaint.

WHEREFORE, the defendants, having fully answered the allegations contained in the numbered paragraphs of the Complaint, respectfully pray that the Complaint herein is dismissed.

Respectfully submitted,

HENRY E. PETERSEN
*Assistant Attorney General*

/s/ Edward S. Christenbury
EDWARD S. CHRISTENBURY
*Attorney, Department of Justice*

/s/ Benjamin C. Flannagan
BENJAMIN C. FLANNAGAN
*Attorney, Department of Justice*

/s/ William R. Hollifield
WILLIAM R. HOLLIFIELD
*Attorney, Department of Justice*
*Washington, D.C. 20530*
*Phone: 202-739-3032*

*Attorneys for defendant Mitchell in his official capacity as former Attorney General of the United States and for defendants Kleindienst and Gray.*

/s/ Robert E.J. Curran
ROBERT E. J. CURRAN
*United States Attorney*

/s/ Michael B.L. Hepps
MICHAEL B.L. HEPPS
*Assistant U.S. Attorney*

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 69 CR 180

UNITED STATES OF AMERICA

*v.*

DAVID T. DELLINGER, ET AL., DEFENDANTS

BEFORE JUDGE HOFFMAN,
FRIDAY, FEBRUARY 20, 1970,
10:00 O'CLOCK A.M.

RESUMED PURSUANT TO ADJOURNMENT.

PRESENT:

MR. FORAN
MR. CUBBAGE
MR. SCHULTZ
MR. EPSTEIN
MR. CONNOLLY
MR. KUNSTLER
MR. WEINGLASS

---

THE COURT: After the indictment in this case was returned, but before trial, the defendants moved for an order directing the government to disclose to them any and all logs, records and memoranda of any electronic surveillance directed at any defendant or any unindicted coconspirator, or upon the premises thereof, and for an evidentiary hearing to determine whether any of the evidence upon which the indictment was based or which the government intended to use at the trial was tainted by such surveillance.

In response, the government admitted that the conversations of certain of the defendants had been overheard during the course of electronic surveillance, but contended that such surveillance was not unlawful, and that disclosure of the record of such surveillance was not required. The government disclosed to the defendants records of certain surveillance operations and submitted to the court sealed ex-

hibits containing the records of other surveillance operations for in camera examination by the court, pursuant to an affidavit of the Attorney General of the United States which stated that the disclosure of the latter exhibits would endanger the national security of the United States.

As the record reveals, the court determined, or, rather decided to defer determination of this matter until after trial. Five of the original eight defendants having been found guilty by the jury under single counts of the indictment, it now is necessary to deal with this matter.

The Supreme Court of the United States has recently held that where electronic surveillance is found to have been unlawful and if a defendant is found to have standing to object to that surveillance, the government must disclose to him the records of overhead conversations which it is not entitled to use in building its case against him. Alderman v. United States, 394 U.S. 165, 180-85, 1969.

Before such disclosure is required, there must be a finding that the surveillance was unlawful and that the defendant has standing to object. Clearly the defendants here have no standing to object to surveillance directed against their co-defendants or against their co-conspirators as expressly held in Alderman, 394 U.S. at 171-76.

It is equally clear, however, that under Alderman each of the convicted defendants has the requisite standing with respect to surveillance in which his own conversations were overheard.

There remains the question of [whether] the surveillance was lawful, since a finding by the court that the surveillance was lawful would make disclosure and further proceedings unnecessary. Giordano v. United States, 394 U.S. 310, 313, 1969.

The determination of the legality of the surveillance can appropriately be made in ex parte in camera proceedings. Giordano v. United States, 394 U.S. at 314. Justice Stewart, concurring. United States v. Battaglia, 410 F.2d 279, 7th Circuit, 1969.

The threshold question, then, is whether the electronic surveillance, during the course of which the conversations

of the defendants were overheard, was or was not lawful. The Fourth Amendment to the Constitution of the United States prohibits "unreasonable searches and seizures," and therefore under the exclusionary rule of Weeks vs. United States, 232 U.S. 383, 1914, evidence seized from a defendant in violation of his Fourth Amendment rights may not be used at trial.

Fruits of such unlawful searches are excluded as well. Silverthorne Lumber Company vs. United States, 251 U.S. 385, 1920.

And "because the amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. Silverman vs. United States, 365 U.S. 505, 1961; Katz vs United States, 389 U.S. 347, 19674.

Moreover, the exclusionary rule applies to violations of Section 605 of the Communications Act of 1934, 47 U.S.C. Section 605, which prohibits the interception and divulgence of telephone conversations without the authorization of the sender. Nardone vs. United States, 302 U.S. 379, 1937. Nardone vs. United States, 308 U.S. 338, 1939.

It is the position of the Government that while the surveillance in question here may not in all instances comply with the broad rules enunciated by the foregoing cases, it should be declared lawful on the ground that there is an exception from the warrant requirements for surveillance authorized by the President or the Attorney General for the purpose of "national security" investigations. An affidavit of the Attorney General submitted to the court with the sealed exhibits states that conversations of the defendant "were overheard by Government agents who were monitoring wiretaps which were being employed to gather foreign intelligence information, or to gather intelligence information concerning domestic organizations which seek to use force and other unlawful means to attack and subvert the existing structure of the Government.

"The records of the Department of Justice reflect that in each instance the installation of wiretaps involved had been expressly approved by the then Attorney General." The defendants argue that there is no such "national security ex-

ception" to the search and seizure rules and that the surveillance carried out by the Government was therefore unlawful. This issue was fully briefed and argued by counsel for the respective parties before trial and I am now prepared to decide it.

The Supreme Court has not addressed itself to the question of whether authorization by other than magistrate—such as by the President or by the Attorney General—would satisfy the Fourth Amendment in a situation involving national security. The question was specifically reserved in Katz vs. United States, 389 U.S. 347, 358, Note 23.

The issue was also raised though not decided, in United States v. Stone, No. 68 CR 1233, an unreported memorandum of decision, United States District Court for the District of Columbia, September 15, 1969. Mr. Justice White concurring in Katz said:

> "... there are circumstances in which it is reasonable to search without a warrant ... Wire tapping to protect the security of the nation has been authorized by successive Presidents ... We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized the electronic surveillance as reasonable."

Mr. Justice Douglas, joined by Mr. Justice Brennan, also concurring in Katz, expressed contrary views, 389 U.S. at 359-60.

Thus, aside from the views expressed by three Justices, the question at hand is one of first impression. The purpose of the Fourth Amendment proscription of unreasonable searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasion by government officials, and, except in certain carefully defined classes of cases, a search is "unreasonable" unless it has been authorized by a valid search warrant. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 528-29, 1967.

There are, however, certain situations in which a warrant is not required and in assessing whether the public in-

terest demands creation of a general exception to the Fourth Amendment warrant requirement, the question is whether the authority to search should be evidenced by a warrant. Camara v. Municipal Court, 387 U.S. at 533.

In making that assessment, it is appropriate to bear in mind the purpose that is served by requiring a warrant before a search may be conducted. The function of the warrant requirement for searches is the same as for arrests: to insure that the deliberate impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Wong Sun v. United States, 371 U.S. 471, 481-82, 1963.

In most criminal investigations, it is both appropriate and feasible for a judicial officer, such as a magistrate, to make an independent determination of whether there is probable cause for a search—or to conduct electronic surveillance. It does not necessarily follow, however, that in all cases this warrant procedure should be required. The gathering of intelligence vital to the preservation of national security, whether deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, or to protect the United States against a clear and present danger to the structure or the existence of its Government, involves considerations of involved factual and policy matters that are uniquely within the competence of the executive branch of the Government. For that reason I agree with the conclusion reached by Judge Ingraham of the Southern District of Texas, in the case of the United States vs. Clay, criminal number 67 §94, a memorandum opinion, July 14, 1969, from which I quote:

> "... it is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonable-practical standpoint, it would be ridiculous to place on a United States Commissioner the burden of deciding what is and is not a threat to national security. The court does not believe the judiciary should question the decision of the executive department that such surveillances are

> reasonable and necessary to the protection of the national interest."

There have been other cases upon which courts have deferred to the executive in matters, the determination of which is more suitably left to that branch of government. In C&S Airlines, Incorporated vs. Waterman Steamship Corporation, 333 U.S. 103, 111, 1948, the Supreme Court said "The President has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevent information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

And the Court said in Coleman vs. Miller, 307 U.S. 433, 455, 1939:

> "There are many illustrations in the field of foreign relations where there are considerations of policy considerations of extreme magnitude and certainly.... incompetent to the examination and decision of a court of justice."

See also Dakota Central Telephone Company vs. South Dakota, 250 U.S. 163, 1919.

Thus, because the matter of when electronic surveillance is reasonably necessary to investigations carried out to protect the national security is a matter not suitable for a judicial determination, but is rather best left to the authorization of the President or his chief legal officer, the Attorney General, I conclude that electronic surveillance in national security cases is not subject to the warrant requirements of the Fourth Amendment.

The remaining question is whether electronic surveillance conducted solely for the purpose of gathering foreign intelligence information, or to gather intelligence information concerning domestic organizations which seek to use force and other unlawful means to attack and subvert the existing structure of the Government, violates Section 605 of the Federal Communications Act.

There, like the Constitutional issue, is an "open question" not yet decided by the Supreme Court. United States vs. Stone, No. 68 CR 1233, District Court of the District of Co-

lumbia, an unreported memorandum of decision, September 15, 1969.

In Nardone vs. United States, 302, U.S. 380, 1937, the Court held that wiretap evidence acquired by the Federal officers was inadmissible at a criminal trial under Section 605.

The Government takes the position that Section 605 does not limit the power of the President to authorize wiretapping for the purpose of gathering intelligence information to preserve the national security. The merit of this position is evidence of the fact that nothing in the legislative history of the Federal Communications Act indicates that Congress intended to prohibit electronic surveillance authorized by the Attorney General for such purposes. The Nardone case reflects no awareness of the problem of the need to gather intelligence information and the need to keep those activities secret. In view of the President's primary responsibility for preserving the national security, it would be unreasonable to conclude that either the Congress in enacting Section 605 or the Supreme Court in deciding Nardone, obtain information vital to the fulfillment of his responsibilities. This interpretation of Congressional intent is borne out by the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, which specifically exempts from its own restrictions and those of the Federal Communications Act and wiretapping authorized pursuant to the Constitutional power of the President to "protect the nation against actual or potential attack or other hostile acts of a foreign power to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security against foreign intelligence activities, and to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

I have carefully examained the surveillance records and the authorization memoranda contained in the sealed exhibits submitted by the Government to the court in camera and I find that the electronic surveillance that was con-

ducted was expressly authorized by the Attorney General for the purpose of gathering intelligence information.

For the reasons I have just set forth, I therefore conclude that the surveillance was lawful and consequently not subject to the disclosure requirements of Alderman vs. United States.

Mr. Clerk, the motion of the defendants for disclosure of electronic surveillance records and for hearing to determine whether their conviction was tainted by such surveillance will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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No. KC-CR-1204

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UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

FELIX LINDSEY O'NEAL a/k/a PETE O'NEAL, DEFENDANT.

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**TRANSCRIPT OF PROCEEDINGS**

Appearances:

HON. ARTHUR J. STANLEY, JR.,
*Chief Judge, Presiding.*

For the Plaintiff:

MR. ROBERT ROTH,
United States Attorney,
Kansas City, Kansas.

MR. JAMES A. FUSATERI,
Assistant U.S. Attorney,
Kansas City, Kansas.

For the Defendant:

MR. AUSTIN F. SHUTE,
845 Law Building,
Kansas City, Missouri.

MR. MICHAEL LERNER,
747 Ann Avenue,
Kansas City, Kansas.

Harold Pittel,
*Official Reporter.*

---

BE IT REMEMBERED, on the 1st, 2nd and 3rd days of September, 1970, the above matter coming on for hearing before the Honorable Arthur J. Stanley, Jr., Chief Judge of the United States District Court for the District of Kansas.

**MORNING SESSION, TUESDAY, SEPTEMBER 1, 1970**

(Whereupon, the following proceedings were had OUT OF THE PRESENCE AND HEARING OF THE JURY PANEL:)

THE COURT: We will be on the record in Case No. KC-CR-1204, United States, vs. Felix Lindsey O'Neal. I understand that counsel had some matter to take up with the Court and I want to take this opportunity, first, because this might be of some significance to counsel in the voir-dire examination, the defendant's motion to require the government to elect between Counts 1 and 3 will be denied since the evidence required to establish the one count, the charge in the one count, would differ from that to be charged in the other.

I have examined in camera the logs of the telephone, intercepted telephone conversations, and I find that all of the interceptions were after the effective date of the Crime Control Act and all were after the date of January 16, 1969, the date the offense is alleged to have been committed and that none of them have any significance with respect to the offenses charged in the three counts in this case and that all were authorized by the President acting through the Attorney General. The case of Alderman versus United States, 394 U.S. 165, has to do with disclosure to the defense of intercepted communications illegally obtained and I hold here and rule that all of the interceptions, the wire taps, in this case, those logs of which were submitted to the Court for in-camera examination, were legally obtained within the inherent constitutional powers of the President because of his responsibility to gather intelligence information having to do with matters vital to national security and in connection with that, I cite the case of United States versus Clay, Fifth Circuit, not yet published, so far as I know, an opinion handed down July 6, 1970, and United States versus O'Baugh, a decision of the District Court of the District of Columbia, I think not published, case in that court numbered CR-1529-67, the decision being dated September 30, 1969. So the logs of the interceptions will be sealed by the Court and returned to the Attorney General where in the

words of Attorney General Mitchell's affidavit, they will be retained under seal so they may be submitted to any appellate court that may review this matter.

Now, if you will forgive me for taking up my matters before I ask you what it was that you wished to take up with the Court, I would ask the defense at whatever time you feel appropriate, Mr. Shute, to assist me in preparation of the instructions, to advise me whether you claim that any of the exceptions under Section 922(a)3 are applicable here, that is, [151] whether you will contend that the defendant is a licensed importer, dealer, et cetera, whether he obtained the gun charged, if he did obtain it, as a bequest or through interstate succession or whether the purchase was authorized under Missouri law or whether it was loaned, the weapon was loaned, or rented for lawful sporting purposes or whether it was lost—whether he had lost a gun in Kansas while engaged in a match or in hunting activities.

MR. SHUTE: Yes, yes.

THE COURT: As I understand, I believe this to be the rule, in this circuit at least, the burden is on the defendant to bring himself within any exception in the statute. If there is any such exception urged, I'll have to prepare to instruct on it.

MR. SHUTE: Are you asking me for that now, Your Honor?

THE COURT: Now or whenever you feel that it is appropriate to tell me. I'll be working on the instructions probably nights.

MR. SHUTE: The only possible exception, Your Honor, would be such a purchase in the State of Missouri would be lawful.

THE COURT: Do you have—

MR. SHUTE: I frankly have tried to see

# Supreme Court of the United States

No. 84-335

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JOHN N. MITCHELL, PETITIONER

*v.*

KEITH FORSYTH

---

ORDER ALLOWING CERTIORARI. Filed October 29, 1984.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

Justice Rehnquist took no part in the consideration or decision of this petition.

FILED
DEC 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-335 (0)

# In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE PETITIONER

REX E. LEE
*Solicitor General*

RICHARD K. WILLARD
*Acting Assistant Attorney General*

PAUL M. BATOR
*Deputy Solicitor General*

SAMUEL A. ALITO, JR.
*Assistant to the Solicitor General*

BARBARA L. HERWIG
GORDON W. DAIGER
LARRY L. GREGG
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## QUESTIONS PRESENTED

1. Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a damages suit against a public official on the ground that the legal standards allegedly violated were clearly established at the time in question.

2. Whether petitioner was entitled to qualified immunity in this case.

3. Whether the Attorney General is entitled to absolute immunity when he makes decisions in the area of national security.

## PARTIES TO THE PROCEEDINGS

In addition to petitioner, the following parties were defendants in the district court: Richard G. Kleindienst, L. Patrick Gray III, Albert Cooper, and E. Davis Porter. Petitioner is the only remaining defendant. Respondent Keith Forsyth was the only plaintiff.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-335

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 729 F.2d 267. The opinion of the court of appeals on respondent's motion to dismiss the appeal (Pet. App. 31a-42a) is reported at 700 F.2d 104. The opinion of the district court (Pet. App. 52a-77a) is reported at 551 F. Supp. 1247. The opinion of the district court denying certification of an interlocutory appeal (Pet. App. 44a-50a) is reported at 551 F. Supp. 1247. The prior opinion of the court of appeals (Pet. App. 83a-116a) is reported at 599 F.2d 1203. The initial opinion of the district court (Pet. App. 117a-142a) is reported at 447 F. Supp. 192.

### JURISDICTION

The judgment of the court of appeals was entered on March 8, 1984. A petition for rehearing was denied on April 3, 1984 (Pet. App. 81a-82a). On June 25, 1984,

Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 31, 1984. The petition for a writ of certiorari was filed on that date and was granted on October 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set out in the petition at page 2.

## STATEMENT

1. In June 1970, the Philadelphia office of the Federal Bureau of Investigation (FBI) was informed by a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to protest the Vietnam War by destroying the underground utility tunnels serving a portion of the federal enclave in Washington, D.C. The plan was to be carried out in February 1971. The FBI also learned that the ECCSL already had been successful in carrying out several raids on draft board offices. In August 1970, the FBI received information that three ECCSL members, including William Davidon, a professor at Haverford College, had discussed a plan to kidnap Henry A. Kissinger, then Assistant to the President for National Security Affairs, simultaneously with the destruction of the utility system.[1] This latter information was conveyed to the White House in addition to the Attorney General (Pet. App. 85a, 120a-121a).[2]

On November 6, 1970, petitioner, serving then as Attorney General of the United States, approved a request by the Director of the FBI to place a telephone sur-

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[1] The ECCSL's plans are discussed in *United States* v. *Berrigan*, 482 F.2d 171, 177-179 (3d Cir. 1973).

[2] During his deposition in this case, Attorney General Mitchell recalled that Secretary Kissinger was provided Secret Service protection in light of the kidnap threat (Mitchell Dep. 60). At that time, Secretary Kissinger was engaged in secret peace negotiations with the North Vietnamese in Paris (Mitchell Dep. 60-62).

veillance on Davidon's home telephone. The primary purpose of this surveillance was to gather intelligence about the ECCSL's plans, although it was anticipated that evidence for use in criminal proceedings might also be obtained. The wiretap was authorized for a period of 30 days and later reauthorized for an additional 30-day period. It was discontinued on January 6, 1971. During the surveillance, conversations between Davidon and respondent Keith Forsyth were overheard on three occasions (Pet. App. 85a-86a).

At the time of the Davidon surveillance, the only two federal courts that had considered the question had held that the President was permitted to order domestic security wiretaps without obtaining a warrant. *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (J.A. 30); *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 3, 1970) (J.A. 38). In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court has expressly reserved decision on the question whether national security surveillances generally require warrants, and conflicting views on this question had been expressed by individual Justices in concurring opinions. Compare *id.* at 359-360 (Douglas, J., joined by Brennan, J., concurring) with *id.* at 362-363 (White, J., concurring). The federal wiretapping statute also provided no definitive answer to this question. Shortly after *Katz* was decided, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, to govern the use of wiretaps. However, a provision of that Act, 18 U.S.C. (1976 ed.) 2511(3), "ma[de] clear that the Act simply did not legislate with respect to national security surveillances." *United States* v. *United States District Court*, 407 U.S. 297, 306 (footnote omitted) (1972) [hereinafter cited as *Keith*].

2. After respondent Forsyth learned of the wiretaps, he instituted this action in the United States District Court for the Eastern District of Pennsylvania against petitioner and two FBI employees who had installed and

maintained the electronic surveillance.[3] Respondent sought damages for the three overhearings of his telephone conversations, claiming that the warrantless electronic surveillance violated Title III and the First, Fourth, and Ninth Amendments to the Constitution.[4]

After discovery, petitioner filed a motion for summary judgment urging, inter alia, that the case be dismissed on absolute and qualified immunity grounds. The district court denied this motion (Pet. App. 117a-142a). The court held (*id.* at 134a-137a) that petitioner was not entitled to absolute immunity under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), because he was functioning as an administrator rather than as a prosecutor. The court also held (Pet. App. 140a-142a) that the claim of qualified immunity could not be resolved on a motion for summary judgment. Applying the qualified immunity standard articulated in *Wood* v. *Strickland*, 420 U.S. 308 (1975), and *Butz* v. *Economou*, 438 U.S. 478 (1978), the court concluded that there were genuine (but unspecified) issues of material fact "in connection with the defendants' affirmative defense of good faith" (Pet. App. 142a).

3. On appeal from the denial of the motion for summary judgment, the court of appeals held that it had

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[3] Respondent also named as defendants former Attorney General Richard G. Kleindienst and former Acting FBI Director L. Patrick Gray III. These defendants' respective terms of office did not coincide with the period of the surveillance, and accordingly the claims against them were voluntarily dismissed in the district court.

[4] One other damage action based on the Davidon surveillance is still pending against petitioner. That suit, *McAlister* v. *Kleindienst*, Civ. Action No. 72-1977 (filed Oct. 10, 1972 E.D. Pa.), which was filed by Davidon and another person overheard on the surveillance, has been stayed pending disposition of appellate proceedings here. In another suit, which was based both upon the Davidon surveillance and another wiretap, the district court recently granted summary judgment for petitioner, holding that the illegality of the wiretaps was not clearly established at the time in question. *Burkhart* v. *Saxbe*, 596 F. Supp. 96 (E.D. Pa. 1984) (see Pet. App. 143a-155a).

jurisdiction to review the district court's denial of absolute immunity (Pet. App. 89a-95a). On the merits of this issue, the court concluded (*id.* at 95a-111a) that, under *Butz* v. *Economou*, 438 U.S. at 515, and *Imbler* v. *Pachtman*, *supra*, the Attorney General is absolutely immune from personal damages liability for his official acts only when performing functions analogous to those of a prosecutor. The court of appeals rejected any notion that broader absolute immunity was needed to protect the Attorney General from harassing lawsuits, stating that "*Butz* * * * was unconcerned with this problem" (Pet. App. 101a). The court of appeals remanded the case to the district court to consider whether, in authorizing the electronic surveillance challenged by respondent, petitioner was exercising a prosecutorial function or was engaged in "purely investigative or administrative function[s]" (Pet. App. 111a). A petition for a writ of certiorari was denied (453 U.S. 913 (1981)) after this Court was unable to render an opinion on related immunity issues in *Kissinger* v. *Halperin*, 452 U.S. 713 (1981).

On remand, the district court again rejected petitioner's claim to absolute immunity (Pet. App. 54a-60a). The court also rejected petitioner's claim to qualified immunity under the new qualified immunity standard articulated in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (Pet. App. 60a-77a). The district court concluded that petitioner had violated a warrant requirement that was "clearly established" long before this Court addressed the national security warrant question "for the first time" in *Keith* (407 U.S. at 299). To support this conclusion, the district court cited (Pet. App. 64a-66a) this Court's holding in *Katz* v. *United States*, *supra*, that nontrespassory surveillances generally require warrants, as well as the concurring opinion of Justice Douglas, joined by Justice Brennan, which the district court stated "should have provided particular guidance to de-

fendant Mitchell and all other attorneys regarding the constitutionality of warrantless domestic security wiretaps" (Pet. App. 65a). The court also concluded that "the Justice Department had reason to know that its position regarding the need for a warrant was subject to both question and attack" because the constitutionality of the surveillance involved in *Keith* had been challenged in a motion filed in the underlying criminal proceedings "more than one month prior to the Attorney General's authorization of the [Davidon] wiretap" (Pet. App. 64a). Finally, the court stated (*id.* at 67a) that "the Attorney General's action was in direct conflict with the language, legislative history, and purpose of Title III."

The district court held that petitioner was liable for the alleged violations and set the case for an evidentiary hearing "to determine whether the plaintiff is entitled to punitive damages and/or compensatory damages" (Pet. App. 76a).[5] In a later ruling, the court declined to certify its order for interlocutory appeal (*id.* at 44a-50a).

4. Petitioner appealed under 28 U.S.C. 1291 and also filed a petition for mandamus, contending that his claims of absolute and qualified immunity had been wrongly denied. Respondent moved to dismiss the appeal for lack of a final, appealable order. A motions panel of the court of appeals denied this motion in part (Pet. App. 31a-43a). The panel held (*id.* at 34a, 43a) that denial of a claim of absolute immunity is immediately appealable and referred the question whether a denial of qualified immunity is appealable as a collateral order to the merits panel. The motions panel stayed further proceedings below, noting that a trial on punitive damages would involve an inquiry into petitioner's motivation and the advice he received from subordinates in the Depart-

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[5] The district court also held that trial was required on the question of the liability of the two FBI employees who actually intercepted respondent's conversations pursuant to the Attorney General's authorization. Respondent subsequently dismissed his claim against the FBI employees.

ment of Justice that might be "as searching as the trial on the merits would have been" (*id.* at 34a). The motions panel further noted (*id.* at 33a n.2) that the district court's ruling on the state of national security electronic surveillance law in 1970 and 1971 differed from that of the District of Columbia Circuit in *Sinclair* v. *Kleindienst*, 645 F.2d 1080 (1981).

In the decision which is now being reviewed, the merits panel first held (Pet. App. 8a-12a) that petitioner was not entitled to absolute immunity. This Court's intervening decision in *Harlow* v. *Fitzgerald* had recognized (457 U.S. at 812) that absolute immunity might be justified "to protect the unhesitating performance" of vital functions by government officials responsible for decisions in "such sensitive areas as national security or foreign policy." However, the court of appeals declined to address this portion of the *Harlow* opinion. Instead the court observed (Pet. App. 9a-12a) that *Harlow* had not changed the analysis of absolute immunity in *Butz* and that petitioner's claim of absolute immunity under the *Butz* analysis had been " '*sub silentio* rejected' " in the court of appeals' prior opinion.

The court of appeals then held (Pet. App. 12a-15a) that denial of petitioner's claim of qualified immunity was not appealable under the collateral order doctrine. The court expressed the fear (*id.* at 15a) that accepting jurisdiction over this issue would "subject our colleagues to unnecessary additional burdens by opening the sluice gates." The court denied petitioner's mandamus petition "for the same reasons" (*ibid.*).

Judge Weis dissented (Pet. App. 15a-29a). Agreeing with decisions of the District of Columbia and Eighth Circuits, he first concluded (*id.* at 16a-20a) that the collateral order doctrine permits an immediate appeal when a claim of qualified immunity is denied on the ground that the legal standard allegedly violated was clearly established at the time in question.

Turning to the merits of the qualified immunity issue, Judge Weis reviewed at length (Pet. App. 20a-28a) the

state of the law in 1970 and early 1971 regarding warrantless national security wiretaps and concluded that "[u]nquestionably, a prohibition against warrantless searches in these circumstances was not 'clearly established'," since "the law of warrantless electronic surveillance in national security cases was only beginning to develop in 1970-71" (*id.* at 27a-28a).

On the issue of absolute immunity, Judge Weis noted (Pet. App 20a) that the claim then before the court, based on the Attorney General's special functions in the area of national security, was different from the claim, based on *Imbler* v. *Pachtman*, *supra*, that had been reviewed in the prior appeal. He wrote that "*Harlow's* discussion of the 'special functions' test, as it might apply to the Attorney General in cases implicating national security, lends a force to the defendant's argument here that was lacking in *Forsyth I*" (Pet. App. 20a). Judge Weis did not address the absolute immunity issue further, however, in light of his conclusion that petitioner was entitled to qualified immunity (*ibid.*).

A petition for rehearing and suggestion for rehearing en banc was denied, with four of the ten active judges voting to rehear the case en banc (Pet. App. 81a-82a).

## SUMMARY OF ARGUMENT

### I.

A. The district court's decision denying petitioner's claim of qualified immunity on the ground that he violated a clearly established legal standard was appealable under 28 U.S.C. 1291, which permits appeals from "final decisions" of the district courts. In determining whether Section 1291's finality requirement has been met, this Court adopts a "practical rather than a technical construction" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)) and evaluates the danger of denying justice by delay compared to the inconvenience and costs of piecemeal review.

These factors weigh strongly in favor of appeal here. As the Court explained in *Butz* v. *Economou*, 438 U.S. 478 (1975) and in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), qualified immunity is intended to protect government officials, not only from adverse money judgments, but from the burdens and distractions of discovery and trial. If an official must await final judgment before appealing an erroneous denial of immunity, this protection will have been irreparably lost. For precisely this reason, this Court has held that an immediate appeal is available when various types of absolute immunity from the burdens of trial are denied. See *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy immunity from second trial); *Helstoski* v. *Meanor*, 442 U.S. 447 (1979) (Congressman's immunity from trial for legislative acts); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1981) (President's absolute immunity from trial for damages). The same appellate rights are needed here.

Allowing an appeal in this situation would not impair the efficient administration of justice. Under *Harlow's* objective test, the question whether an official violated a "clearly established" constitutional or statutory right will present issues of law not enmeshed with any disputed facts. Thus, deferring appellate review until after trial would not aid the courts of appeals in deciding these questions. In addition, experience in the District of Columbia Circuit, where such appeals have been allowed for two years, suggests that the burden of additional appeals will be minimal. Indeed, overall judicial efficiency will be improved by the prompt appellate termination of meritless suits against government officials, which often drag on for many years.

An appeal from the denial of a government official's claim of immunity falls within the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546. This doctrine permits an immediate appeal if an order (1) definitively determines the disputed question, (2) is separable from and collateral to the re-

mainder of the case, and (3) would be effectively unreviewable on appeal. Here, there can be no doubt that the district court definitively rejected petitioner's assertion that he violated no "clearly established" legal right. Petitioner's claim is also separable from and collateral to the remainder of the case because it presents a pure question of law that would not be illuminated by the remaining trial proceedings and because its purpose is not simply to secure an early decision on the merits, but to safeguard petitioner's immunity against further burdensome and intrusive trial proceedings. Finally, petitioner's qualified immunity claim would not be effectively reviewable after final judgment because by that time the very purpose of immunity—to protect petitioner from the burdens of discovery and trial—would have been irrevocably sacrificed.

B. If this Court agrees that the denial of petitioner's qualified immunity claim was appealable, we urge the Court itself to decide now whether petitioner was entitled to qualified immunity, rather than remanding for a decision on that issue by the court of appeals. Under *Harlow*, a government official is immune from liability for damages unless he violated a "clearly established" legal standard, and there can be no serious dispute that the need for a warrant for national security wiretaps was not clearly established in late 1970 and early 1971, when the wiretap at issue ~~were~~ was installed. In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court had expressly reserved decision on this question, and individual members of the Court had expressed differing views with respect to it. It was not until June 1972—15 months after the termination of the wiretap involved in this case—that this Court again addressed the question and held in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972), that a warrant is needed.

The lower court cases in the post-*Katz*, pre-*Keith* era also did not establish the need for a warrant to investigate a domestic threat to national security. At the time

of the wiretap involved here, the only decisions on the question were two district court cases holding that a warrant was not needed. And when this Court addressed the question in *Keith*, it noted (407 U.S. at 299) that it was deciding the question for "the first time" and that such warrantless wiretaps had been conducted by Presidents for more than 25 years "without * * * a definitive decision of this Court."

With the exception of the district court in the present case, every other court that has examined the state of wiretapping law in 1970 and 1971, including the District of Columbia Circuit, has concluded that the need for a warrant in domestic national security cases was not clearly established until this Court's decision in *Keith*. And the Ninth Circuit has held that *Keith* was not even clearly foreshadowed. The district court's contrary conclusion here cannot be defended.

## II.

The Attorney General should be absolutely immune from liability for damages when he acts to protect the national security. In *Harlow*, 456 U.S. at 812, this Court noted that in sensitive areas such as national security and foreign policy, "unhesitating performance of functions vital to the national interest" may justify absolute immunity. We believe that the Attorney General should not be subject to personal monetary liability when he is acting to prevent acts that endanger national security, and that absolute immunity is therefore justified.

Protecting the domestic security of the Nation from terrorism, violence, and espionage is one of the President's paramount duties, and the Attorney General is the Cabinet officer who bears the principal operational responsibility for these vital matters. When national security is imperiled, the Attorney General must act promptly, decisively, and effectively. He should be concerned solely for the national good and should not have to worry about personal liability in damages or about the burdens and

risks of prolonged litigation. Decisions concerning national security are too important, and the price of bad decisions or inaction is too high, to permit such considerations to distort the decisionmaking process. In this very case, petitioner was forced to confront a kidnapping plot that threatened danger to the person of one of the President's principal foreign policy advisors and that could have compromised some of the country's most vital secrets. The need for effective action to block such a threat far outweighs whatever incremental deterrent effect the possibility of liability in damages might provide.

Absolute immunity in this restricted area would not render the Attorney General unaccountable for his actions. Other potent remedies would remain, including suits for injunctive and declaratory relief, motions to suppress evidence seized in bad faith, congressional oversight, dismissal from office, impeachment, and criminal prosecution.

Qualified immunity does not furnish sufficient protection in this area, just as it does not furnish sufficient protection for judges, prosecutors, and the President. Notwithstanding *Harlow*, qualified immunity leaves a decisionmaker, acting without the benefit of hindsight, in an atmosphere of substantial uncertainty and subject to serious risk that unhesitating and energetic action will lead to protracted litigation.

## ARGUMENT

### I. PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY UNDER *HARLOW* FOR AUTHORIZING WARRANTLESS DOMESTIC SECURITY WIRETAPS IN 1970 AND 1971

#### A. Denial of a Qualified Immunity Claim in a *Bivens* Suit Is Appealable Under the Collateral Order Doctrine

1. "The first Judiciary Act of 1789, 1 Stat. 73, established the general principle that only *final* decisions of the federal district courts would be reviewable on ap-

peal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 83 (1981) (emphasis in original). "With occasional modifications, [this] requirement has remained a cornerstone of the structure of appeals in the federal courts." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306 (1962) (footnote omitted). Today, this principle is embodied in 28 U.S.C. 1291, under which the courts of appeals have jurisdiction of all "final decisions" of the district courts except where there is a right of direct appeal to this Court.

As Justice Jackson noted in *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (emphasis in original), however, "it is a final *decision* that Congress has made reviewable," not a final judgment. "While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Ibid.* "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964). In determining whether the requirement of finality is met, this Court adopts a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). In essence, this means that the Court decides whether allowing an appeal from a particular type of order comports with the purposes of the final judgment rule. The Court has observed that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Gillespie* v. *United States Steel Corp.*, 379 U.S. at 152-153, quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). See also *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974).[6]

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[6] In *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 4, this Court recently elaborated on the considerations underlying the finality requirement:

> The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing

2. These considerations weigh strongly in favor of allowing appeal when a government official's qualified immunity is denied before trial, because "the danger of denying justice by delay" is great. This Court has not addressed the specific issue presented in this case—whether government officials who are sued for damages may appeal the denial of qualified immunity claims. But the nature of the qualified immunity right, as explained by this Court, demands such appeal rights if the official's immunity is to be fully protected. In *Butz* v. *Economou*, *supra*, the Court held that Cabinet and other executive officers are not protected by blanket absolute immunity but instead are generally entitled to only qualified immunity. However, a corollary of this holding was that "[i]nsubstantial lawsuits" should be "quickly terminated" (438 U.S. at 507). The Court expressed the expectation that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits" (*id.* at 508). See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part).

When this expectation was not borne out, the Court modified the qualified immunity standard in *Harlow*. Time and again, the *Harlow* court emphasized that an executive official's qualified immunity includes the right not to undergo protracted and burdensome trial proceedings on insubstantial claims:

> [In *Butz*,] we emphasized our expectation that insubstantial suits need not proceed to trial[.]

457 U.S. at 808.

> [P]etitioners assert that public policy * * * mandates an application of the qualified immunity

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appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

> standard that would permit *the defeat of insubstantial claims without resort to trial.*

*Id.* at 813 (emphasis added).

> [In *Butz* and *Scheuer*], we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." * * * Yet petitioners advance persuasive arguments that the *dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith" standard established by our decisions.*

*Id.* at 814-815 (emphasis added).

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that *insubstantial claims should not proceed to trial.*

*Id.* at 815-816 (emphasis added).

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there *the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of the able people from public service.* There are special costs to "subjective" inquiries of this kind.

*Id.* at 816 (emphasis added).

> [B]are allegations of malice should not suffice to subject government officials either to *the costs of trial or to the burdens of broad-reaching discovery.*

*Id.* at 817-818 (emphasis added) (footnote omitted).

> Reliance on the objective reasonableness of an official's conduct, * * * should avoid *excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.*

*Id.* at 818 (emphasis added). See also *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 11-12.

*Harlow* could hardly have made it clearer that an executive officer's qualified immunity includes a right not to be tried or burdened by pretrial procedures unless his alleged conduct violated a clearly established legal standard. See *Krohn* v. *United States*, 742 F.2d 24, 28 (1st Cir. 1984); *McSurely* v. *McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982). This right is closely analogous to the double jeopardy "guarantee against being twice put to trial for the same offense" (*Abney*, 431 U.S. at 660-661) (emphasis in original deleted), as well as a Congressman's immunity under the Speech or Debate Clause "not only from the consequences of litigation's results but also from the burden of defending [himself]." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967); see also *Helstoski* v. *Meanor*, 442 U.S. at 508. The Court has recognized in *Abney* and *Helstoski* v. *Meanor* that full protection of Double Jeopardy and Speech or Debate Clause rights requires that pretrial appeals be available.

This Court has also held that an order denying a claim of absolute immunity from damages liability is immediately appealable. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982). As the District of Columbia Circuit stated in a decision on which the *Nixon* court relied (*ibid.*):

> If [the defendants] are required to respond to interrogatories, answer questions put in depositions, and defend themselves in a plenary trial covering the whole of their activities, they will have been forced to surrender their claimed privilege regardless of its validity. An appeal from the final judgment in the action will come too late to give meaningful review of their claim.

*McSurely* v. *McClellan*, 521 F.2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F.2d 1277, 1283-1284 & n.18 (D.C. Cir. 1976), cert. dismissed, 438 U.S. 189 (1978). The same appellate rights are needed to protect the qualified immunity extended under *Butz* and *Harlow*.

"'[T]he costs of piecemeal review'"[7] in the present situation do not dictate a different result. Under *Harlow's* objective test, qualified immunity appeals will present pure questions of law not enmeshed with any disputed facts. Consequently, deferring appellate review until after final judgment would not assist the courts of appeals in deciding these questions. To be sure, allowing appeal before final judgment may mean that there will be more appeals, a matter of legitimate concern for overburdened appellate judges. Experience, however, suggests that the number of additional appeals will not approach the level suggested by the court of appeals in this case (Pet. App. 14a-15a). The denial of qualified immunity has been appealable in the District of Columbia Circuit for almost exactly two years, since *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982), but we do not believe that any federal defendant has taken such an appeal in the D.C. Circuit during that period. Experience has also shown both that the overwhelming percentage of suits for damages against government officials lack merit[8] and that such suits frequently linger in the trial courts for inordinate periods.[9] Allowing officials to appeal denials of qualified immunity will assist in bring-

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[7] *Gillespie* v. *United States Steel Corp.*, 379 U.S. at 152-153, quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. at 511.

[8] See P. Schuck, *Suing Government* 70 (1983) ("[A]pproximately 10,000 *Bivens* actions have reportedly produced only thirteen judgments for plaintiffs.")

[9] The reported decisions involving qualified immunity appeals illustrate this problem. In this case, 12 years have passed since the filing of the complaint (J.A. 1). See also *National Black Police Ass'n* v. *Velde*, 712 F.2d 569, 572 (D.C. Cir. 1983), cert. denied, No. 83-1254 (Apr. 30, 1984) (9 years from filing of complaint to denial of certiorari); *McSurely*, 697 F.2d at 314 (13 years from complaint to decision on qualified immunity); *Krohn* v. *United States*, 578 F. Supp. 1441, 1444 (D. Mass.), rev'd in part, 742 F.2d 24 (1st Cir. 1984) (8 years); *Kenyatta* v. *Moore*, 744 F.2d 1179, 1181 (5th Cir. 1984) (7 years).

ing meritless suits to a speedier end and thus will promote, rather than detract from, "the efficient administration of justice" (*Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 4). See Pet. App. 28a (Weis, J., dissenting). Moreover, it is not uncommon for defendant officials to assert claims of both absolute and qualified immunity, as petitioner did in this case. Since it is already established that the denial of absolute immunity is appealable, permitting an appeal on the issue of qualified immunity as well would not result in any additional appellate proceedings in these cases.

3. The seminal case of *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, involved a situation in which, as in this case, the purposes of the final judgment rule were served by allowing an appeal from an order other than the final judgment. In *Cohen*, which was a stockholder's derivative action brought in federal court under diversity jurisdiction, a state statute entitled the corporation to demand security in advance for litigation expenses. The district court ruled that the statute was inapplicable, and this Court held that the order was immediately appealable. The Court observed (337 U.S. at 546):

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

More recent cases have restated *Cohen's* formulation as a three-part test:

> First, [a trial court order] "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment."

*Flanagan* v. *United States*, slip op. 6, quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); see also *United States* v. *MacDonald*, 435 U.S. 850, 855 (1978); *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

Despite the utility of *Cohen* as a most important rule of thumb, this Court has always understood that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 170. Many decisions of this Court permitting appeal under *Cohen* in civil cases cannot easily be fitted into this three-part test. For example, in *Gillespie* v. *United States Steel Corp.*, *supra*, appeal was permitted from an order striking certain wrongful death claims on the ground that they were precluded by an exclusive statutory remedy. This order may have "conclusively determine[d]" this legal question, but the validity of a plaintiff's claims would not appear to be "completely separate from the merits of the action" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468). Likewise, the Court did not find that the order striking the claims would "be effectively unreviewable on appeal from a final judgment" (*ibid.*) but only that "it [did] not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered." (*Gillespie* v. *United States Steel Corp.*, 379 U.S. at 153).

*Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963), similarly, does not fit neatly into the three-part test. There, the Court held that an order rejecting a claim of improper venue was final under 28 U.S.C. 1257, even though there was no suggestion that the question of venue could not have been reviewed effectively on appeal from the final judgment. See also *Local No. 438 Construction Laborers* v. *Curry*, 371 U.S. 542 (1963).

4. As these cases illustrate, *Cohen* and its progeny have not been understood to lay down a rigid test for

finality; instead, the *Cohen* test, like the final order rule itself, must be given a "practical rather than a technical construction" (*Cohen*, 337 U.S. at 546). Ultimately, the inquiry must be whether allowing an appeal is consistent with the purposes of the final judgment rule, and each prong of the *Cohen* test should be interpreted in light of those purposes.

The first prong—the requirement that the trial court order "must conclusively determine the disputed question" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468)—ensures that the matter is ripe for appeal. It promotes "the efficient administration of justice" (*Flanagan*, slip op. 4) by precluding appellate review until all of the relevant facts and legal issues have been fully developed and the trial court has had an opportunity to complete its consideration of the matter. Under this prong of the test, the Court has repeatedly "rejected immediate appealability * * * of claims that 'may fairly be assessed' only after trial * * * and those involving considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981). See also *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 469; *United States* v. *MacDonald*, 435 U.S. at 860.

The third prong, which requires that the trial court order must "be effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand*, 437 U.S. at 468), ensures that there is a practical reason for allowing an appeal before entry of the final judgment. It requires that "the danger of denying justice by delay" outweigh "the inconvenience and costs of piecemeal review." *Gillespie* v. *United States Steel Corp.*, 379 U.S. at 152-153.

The purposes served by the second prong—the requirement that the order must resolve an issue "completely separate from the merits of the action" (*Coopers & Lybrand*, 437 U.S. at 468)—are somewhat less obvious. The "separate" or "collateral" nature of the order is not demanded for abstract or technical reasons. Instead this

prong appears to promote the same purposes as the first and third prongs. Like the first prong, it prevents appeal before full development and resolution at the trial level of all factual and legal issues. If an order relates to a collateral matter, rather than being closely connected to the merits of the case, there is much less chance that subsequent developments at trial will cast new light on the matter or prompt its reconsideration.[10]

The second prong, like the third, also ensures that there is a special reason for allowing an appeal before final judgment. The final order rule is predicated on the principle that the right to appeal should not ordinarily be extended simply to prevent a trial on unmeritorious criminal charges or civil claims. In the criminal context, the Court has observed that "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); see also *Flanagan*, slip op. 8. No doubt the same prin-

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[10] The relationship between the first and second prongs of the three-part test has frequently been noticed by this Court. In *MacDonald*, 435 U.S. at 859, the Court remarked:

> Closely related to the "threshold requirement of a fully consummated decision," *Abney* v. *United States*, 431 U.S. at 659, is the requirement that the order sought to be appealed be "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged."

In *Flanagan*, which held that an order disqualifying counsel in a criminal case is not immediately appealable, the Court at one point assumed (slip op. 9) that the defendants' Sixth Amendment claims required "some specifically demonstrated prejudice to the defense" and explained that "[o]n this assumption, a disqualification order * * * is not independent of the issues to be tried" because "[its] validity cannot be adequately reviewed until the trial is complete." See also *Abney*, 431 U.S. at 660 (emphasis added) (citation omitted) ("[T]he matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself *in the sense that they will not affect, or . . . be affected by, decision of the merits of this case.*")

ciple applies in the civil context. Thus, if an appellant merely seeks an advance ruling on the merits or on a matter that will merge into the judgment on the merits (see *Cohen*, 337 U.S. at 546), appeal generally will not be entertained. In order to qualify under *Cohen*, the appeal must be "separate" from or "collateral" to the merits in this sense.[11]

5. The district court's order in this case, which denied petitioner's claim to qualified immunity, satisfies the formulation taken from *Cohen*. Such orders are therefore appealable. *Krohn* v. *United States*, 742 F.2d 24 (1st Cir. 1984); *Evans* v. *Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982). Contra, *Kenyatta* v. *Moore*, 744 F.2d 1179 (5th Cir. 1984).[12]

a. There can be no doubt that the district court's decision "constitute[s] a complete, formal, and, in the trial court, final rejection" of petitioner's claim. *Abney* v. *United States*, 431 U.S. at 659. Nearly seven years have passed since Judge Broderick initially rejected petitioner's claim of qualified immunity (Pet. App. 117a), and during that time, the standard for qualified immunity was significantly altered by this Court in *Harlow*. Yet Judge Broderick steadfastly adhered to his original conclusion

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[11] This function of the second prong of the *Cohen* test has also been noted by this Court. For example, in *Abney* the Court explained that a double jeopardy claim is "collateral to, and separable from" the principal issue of the accused's guilt or innocence because (431 U.S. at 659 (emphasis added)):

> [i]n arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. * * * *Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.*

[12] For the Fourth Circuit's treatment of this issue, see page 26 note 17, *infra*.

that petitioner is not protected by any form of immunity. "There are simply no further steps that can be taken in the District Court to avoid the trial [petitioner] maintains is barred." *Abney*, 431 U.S. at 659.

b. Likewise, the appeal in this case satisfied the third prong of the *Cohen* test—which is "[p]erhaps [the] most important" (*United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 266 (1982))—for it is abundantly clear that the district court's decision involves "an important right which would be 'lost, probably irreparably,' if review had to await final judgment." *Abney*, 431 U.S. at 658, quoting *Cohen*, 337 U.S. at 546. As we have noted, one of the purposes of qualified immunity is to relieve officials of the burdens of pretrial and trial unless the alleged conduct violated a clearly established legal standard (see pages 14-16, *supra*). Unless the denial of qualified immunity can be appealed before discovery or trial, this purpose will be irreparably compromised.

In agreeing with the Third Circuit that denial of a qualified immunity claim cannot be appealed until final judgment, the Fifth Circuit expressed the sanguine belief (*Kenyatta* v. *Moore*, 744 F.2d at 1184) that "few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights." The present case vividly illustrates that this confidence can be misplaced, particularly in the case of an unpopular defendant. Prior to handing down its final decision on qualified immunity, the district court had the benefit of decisions by two courts of appeals finding that the illegality of petitioner's conduct was not clearly established or even foreshadowed at the time in question (see page 30-31, *infra*). Nevertheless, the district court rejected petitioner's qualified immunity claim. Moreover, despite the weighty contrary authority and despite this Court's admonition in *Harlow* that insubstantial *Bivens* claims should not be allowed to proceed to discovery or trial, the district court refused to certify the qualified immunity

issue for appeal under 28 U.S.C. 1292(b).[13] The court of appeals, in turn, refused to entertain petitioner's appeal under the collateral order doctrine, refused to address the well established rules governing such appeals, and denied petitioner's mandamus petition without explanation, thereby subjecting petitioner to an unnecessary and potentially protracted trial on the issue of damages. The prospect of such treatment will " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties' " (*Harlow*, 457 U.S. at 814 (citation omitted)).

c. Further, petitioner's appeal is "separate" and "collateral' in the sense that it sought something other than an advance ruling on the merits or on a matter that will emerge from and merge into the judgment on the merits. Instead, petitioner's appeal sought to vindicate a special immunity from trial analogous to the immunities asserted in *Nixon*, *Abney*, and *Helstoski* v. *Meanor*.[14] The district court's decision here was also "collateral" and "separate" in the sense that its correctness would not be affected by anything that might occur during the remaining trial proceedings.[15] Consequently, petitioner's appeal satisfies the second prong of the *Cohen* formulation.[16]

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[13] Compare *McSurely* v. *McClellan*, 697 F.2d at 316-317 n.12 (certification under Section 1292(b) "particularly appropriate" in this situation).

[14] See Pet. App. 34a.

[15] See also *Chagnon* v. *Bell*, 642 F.2d 1248, 1261 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981) (contrasting qualified immunity inquiry with merits of Fourth Amendment claim); Pet. App. 34a.

[16] We are not arguing that the denial of summary judgment is immediately appealable when resolution of a qualified immunity claim turns on disputed facts, but only that an appeal should be allowed when the qualified immunity claim turns solely on a question of law. This may occur in two contexts. The first and probably the most common is exemplified by this case, in which petitioner's actions are not disputed. In such a situation, if qualified immunity is denied, liability will have been established and the

6. The court of appeals' reasons for holding that it lacked appellate jurisdiction are unsound. The court declined to address this Court's precedents under the collateral order doctrine. Instead, the court of appeals rested (Pet. App. 12a-14a) on its prior, summary treatment of the issue of appealability (see Pet. App. 94a-95a). But that prior holding antedated *Harlow's* deletion of the subjective element of the qualified immunity defense, and consequently at that time petitioner and the other defendants did not "seriously contend that the denials of their motions for summary judgment on that issue [were] appealable under the three requirements of *Cohen*" (Pet. App. 95a).

The court of appeals protested (*id.* at 14a-15a) that its docket was already "crushing" and that there was accordingly no room for qualified immunity appeals. As noted, however, the court's fears about the number of qualified immunity appeals appear exaggerated (see page 17, *supra*).

Finally, the court of appeals advanced the strange argument (Pet. App. 14a) that an appeal could not be taken here because respondent's claims were not "insubstantial." The Fifth Circuit adopted the same argument in *Kenyatta* v. *Moore*, 744 F.2d at 1184, and added (*id.* at 1186) that orders denying qualified immunity should not be "appealable per se" because many such claims "involve only the application of settled principles, not important, unresolved legal issues." The analysis of both circuits is misguided. It is true that the collateral order doctrine is limited to decisions concerning "an impor-

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only remaining issue will be the wholly separable question of damages.

The other situation in which an appeal should be allowed is where the facts are contested but the defendant contends that even the conduct alleged by the plaintiff did not violate any clearly established rule of law. Here too, the pure question of law presented by the summary judgment motion will not be affected by any fact brought out at trial. The most that a trial might establish is that the plaintiff's allegations were correct.

tant issue" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468), but this involves a categorical, not a case-by-case determination. "Appeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). *Harlow* has made it unmistakably clear that an executive official's right not to undergo discovery and trial if no clearly established constitutional rights were violated is a matter of important public policy. In the face of that determination by this Court, it is not for the courts of appeals to prejudice the vindication of this right by ad hoc prejudgments of the merits or by disparaging its significance. When a district court incorrectly denies qualified immunity because it misapplies clear or settled law—as Judge Broderick unquestionably did here—the violation of *Harlow* is all the more flagrant, and prompt appellate correction is especially "important." [17]

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[17] Taking a narrower view than the court of appeals below and the Fifth Circuit, the Fourth Circuit has held that rejection of a qualified immunity claim is not appealable where there are overlapping claims for injunctive relief that would require trial in any event. *England* v. *Rockefeller*, No. 83-1851(L) (July 16, 1984), and *Bever* v. *Gilbertson*, 724 F.2d 1083 (4th Cir. 1984) (rehearing denied by equally divided court), cert. denied, Nos. 84-25 and 83-2139 (Oct. 29, 1984). The court reasoned (724 F.2d at 1087) that "[a] present declaration of immunity from damage claims cannot avoid the diversion of their attention from other official duties which the litigation will occasion." There is some force to this reasoning but we do not believe it is sufficient to overcome the strong grounds for protecting public officials from trial on insubstantial damages claims. See *Tubbesing* v. *Arnold*, 742 F.2d 401, 403-405 (8th Cir. 1984) (rejecting *Bever* distinction). The burden of defending an action for injunctive relief in one's official capacity is not comparable to the burden of defending against a suit for damages. Moreover, disallowing appeal in only those cases with overlapping injunctive claims might well encourage the filing of injunctive claims, together with claims for damages, for the sole purpose of cutting off appeal rights. Such a rule would also have the incongruous effect of providing less protection for current

### B. Petitioner Did Not Violate a Clearly Established Legal Standard

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow* v. *Fitzgerald*, 457 U.S. at 818). If anything can be clear, it is that no "clearly established" rights of any sort were violated when petitioner authorized the warrantless domestic security wiretaps at issue in this case.

1. In June 1972, this Court held in *Keith* that the Fourth Amendment requires a warrant for domestic security wiretaps. *But the wiretaps in this case ended 15 months earlier, in January 1971.* At that time the constitutional rule adopted in *Keith* cannot be characterized as having been "clearly established."

Certainly this Court had not decided the question prior to *Keith*. In *Katz* v. *United States*, 389 U.S. 347 (1967), the Court had held for the first time that electronic surveillance, whether or not accompanied by a physical trespass, constitutes a search and seizure within the meaning of the Fourth Amendment if it violates a legitimate expectation of privacy. The Court held (389 U.S. at 354-359) that a warrant was required for the electronic surveillance in that case. But the Court did not rule out the possibility of exceptions in other circumstances, and pointedly observed (389 U.S. at 358 n.23):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

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officials than for former officials. Yet the deleterious effect of damages actions on current officials, whose performance of public responsibilities may be affected, is probably greater than the effect on former officials who are no longer in government service.

In a concurring opinion, Justice White noted this portion of the Court's opinion and wrote (*id.* at 363-364):

> Wiretapping to protect the security of the Nation has been authorized by successive Presidents. * * * * * We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

See also *Berger* v. *New York*, 388 U.S. 41, 112-118 (1967) (White, J., dissenting).

In another concurring opinion, Justice Douglas, joined by Justice Brenann, disagreed, terming Justice White's opinion "a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters" (389 U.S. at 359).

Thus, *Katz* explicitly left open the question of the legality of warrantless national security wiretaps, with one Justice suggesting that such wiretaps might be constitutional and two others disagreeing. This Court did not provide further guidance on the question until *Keith*.

2. The lower court decisions in the post-*Katz*, pre-*Keith* era also did not establish the illegality of warrantless domestic security wiretaps. At the time of the surveillance in this case, the only two federal courts that had considered the question had held that the President was permitted to order such wiretaps without obtaining a warrant. *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (J.A. 30); *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 3, 1970) (J.A. 38). When the Sixth Circuit decided *Keith* in April 1971 —four months after the end of the wiretap in this case—the court noted that the question "ha[d] never been

decided at the appellate level by any court."[18] *United States* v. *United States District Court*, 444 F.2d 651, 656 (6th Cir. 1971) (footnote omitted). The Sixth Circuit held that a warrant was necessary for wiretaps investigating domestic subversion, but Judge Weick filed a strong dissent (444 F.2d at 671-677). And when this Court addressed the question in *Keith*, the Court wrote (407 U.S. at 299) (emphasis added) (footnote omitted):

> The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. *Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definite decision of this Court. This case brings the issue here for the first time.* Its resolution is a matter of national concern * * *.

This language cannot be reconciled with the district court's view that the issue decided in *Keith* had in fact been "clearly established" years before.

Thus far, we have discussed only those cases dealing with the narrow issue of wiretaps used to investigate domestic, as opposed to foreign, threats to national security.[19] Before *Keith*, however, it was not apparent that the difference between these two situations was constitutionally significant. For example, Justice White's concurring opinion in *Katz* stated broadly (389 U.S. at 363) that warrants should not be required in "national

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[18] At that time, two district courts had held that no warrant was required, and two had held to the contrary. Compare *United States* v. *Dellinger, supra*, and *United States* v. *O'Neal, supra*, with *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), and the district court decision in *Keith*.

[19] Whether a warrant is constitutionally needed in the latter situation is still unresolved (see *Keith*, 407 U.S. at 321-322 & n.20).

security" cases and drew no distinction between cases involving domestic and foreign subversion. In like manner, Judge Weick's dissent in *Keith* argued (444 F.2d at 674) that warrantless electronic surveillance was equally justified in both situations because "[t]he risk of injury to the Government is just as great whether the attacks are from within or without." Thus petitioner was fully justified in relying on the much larger body of case law supporting the constitutionality of warrantless wiretaps in all types of national security cases. See *Zweibon* v. *Mitchell* (*Zweibon IV*), 720 F.2d 162, 171 (D.C. Cir. 1983), cert. denied, No. 83-2005 (Oct. 9, 1984).[20]

3. With the exception of the district court in the present case, every court that has addressed the question has concluded that the illegality of warrantless domestic security wiretaps was not "clearly established" prior to this Court's decision in *Keith*. In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084-1085 (1981), the District of Columbia Circuit held that petitioner did not violate a clearly established standard when he authorized wiretaps that terminated in January 1971, shortly *after* those at issue here. Similarly, in *Zweibon IV*, 720 F.2d at 170, the same court held that "there existed no clearly established warrant or reasonableness requirements" during the period from October 1970 to July 1971. More recently, another district judge in the Eastern District of Pennsylvania has sustained petitioner's claim of immunity in another case involving the Davidon (and one other) wiretap, concluding that "by any fair objective test, at the time the wiretaps in question were authorized by the Attorney General and throughout the entire time that the

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[20] See, *e.g.*, *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970), aff'd, 494 F.2d 593 (3d Cir.), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970), appeal dismissed, 456 F.2d 1112 (5th Cir. 1972) (per curiam), aff'd, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); *United States* v. *Clay*, Cr. No. 6711-94 (S.D. Tex. July 14, 1969), aff'd, 430 F.2d 165 (5th Cir. 1970), rev'd, 403 U.S. 698 (1971).

wiretaps were in place, the law that domestic national security wiretaps authorized by the Attorney General required warrants was not 'clearly established.'" *Burkhart* v. *Saxbe*, 596 F. Supp. 96 (E.D. Pa. 1984) (Pet. App. 149a). Furthermore, the Ninth Circuit has held that the decision in *Keith* was not even "clearly foreshadowed" and thus should not be applied retrospectively. *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978). Obviously, if *Keith* was not "clearly foreshadowed," its holding could not have been "clearly established" law 15 months earlier.

4. The district court's reasons for departing from this body of precedent are insubstantial and reflect a fundamental misunderstanding of both the nature of qualified immunity under *Harlow* and the responsibilities of the Attorney General. First, the court opined (Pet. App. 62a) that "[t]he *Keith* majority opinion reached [its] conclusion with little difficulty because of the clarity of the existing precedents, including the 18th Century opinions of Lord Mansfield." But the test for qualified immunity should not depend on a necessarily impressionistic judgment whether this Court reached its decision in *Keith* with or without "difficulty." The proper test is whether petitioner violated a clearly established rule of law.

The district court next relied (Pet. App. 63a) on a decision of the District of Columbia Circuit holding that *Keith* was "clearly foreshadowed" by earlier cases and should therefore be given retroactive effect. *Zweibon* v. *Mitchell* (*Zweibon III*), 606 F.2d 1172 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981). However, as the District of Columbia Circuit itself recognized in a later opinion in the same case, "the 'clearly established' test for immunity purposes" is not "coterminous with the 'clearly foreshadowed' test courts employ to determine whether a judicial decision ought to be given retroactive effect." *Zweibon IV*, 720 F.2d at 172; see also *id.* at 172-173; *Zweibon III*, 606 F.2d at 1181 n.49. Whether or not a decision of this Court should be given normal retro-

spective effect is a very different issue than the one governed by *Harlow*: whether a government official should be subject to personal monetary liability for policy decisions which when made did not violate any clearly established rights. *Harlow*'s objective test was intended to permit the prompt and sure determination of the issue of qualified immunity; merging that test with the one governing the general question of retroactivity would invite the lower courts "to embrace the exilarating opportunity of anticipating a doctrine which may be in the womb of time." *Spector Motor Service, Inc.* v. *Walsh*, 139 F.2d 809, 823 (2d Cir.) (L. Hand, J., dissenting), judgment vacated and remanded to the district court *sub nom. Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101 (1944).

The district court also relied (Pet. App. 64a-65a) on the general principle enunciated in *Katz* that warrantless searches are constitutional only if they fall within a few recognized exceptions. In so doing the court simply overrode the fact that in *Katz* this Court expressly reserved decision on the question whether national security wiretaps fell into such an exception, and that individual Justices expressed differing views on the subject.[21]

The district court faulted petitioner because "more than one month prior to the Attorney General's authorization of the wiretap at issue in this case" a defense motion filed in the district court proceedings that gave rise to *Keith* should have given "the Justice Department

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[21] Moreover, by the district court's reasoning, *Katz* must have clearly established that warrantless electronic surveillance is always illegal. Yet in *Keith*, the Court left open the question whether a warrant is constitutionally required for wiretaps used to investigate foreign threats to the national security (407 U.S. at 321-322 & n.20). The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801-1811, was enacted to govern such wiretaps, but the constitutional question remains unresolved. See *Chagnon* v. *Bell*, 642 F.2d 1248, 1257-1261 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981) (former Attorney General Bell entitled to qualified immunity for authorizing warrantless foreign security wiretap in 1977-1978).

* * * reason to know that its position regarding the need for a warrant was subject to both question and attack" (Pet. App. 64a). And if this motion was not enough, the district court continued (Pet. App. 64a), "[a]fter January 25, 1971 [*i.e.*, several weeks after the wiretap in this case ended], the government had overwhelming reason to know that its conduct was unconstitutional" as a result of the district court's decision in *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), which granted that motion. The district court also suggested that petitioner was bound to accept the views expressed in Justice Douglas's concurring opinion in *Katz* (and presumably to ignore those expressed in Justice White's concurring opinion). The district court wrote (Pet. App. 66a):

> [I]n 1967, the *Katz* majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost that gamble in *Keith*.

We submit that the approach to issues of immunity implicit in this passage not only cannot be reconciled with the policy concerns that animated this Court in *Harlow*, but itself vividly illustrates the mischief that *Harlow* sought to cure. The central *point* of *Harlow* was that difficult and important decisions made by government officials in an environment of legal uncertainty should *not* be transformed into gambling games in which crushing personal liability becomes a cost of making erroneous guesses about how the courts in the future will resolve these uncertainties. And it is absurd to suggest that the Attorney General should require discontinuation

of an investigative technique simply because it has been challenged by a defendant in a criminal case or rejected by a single district court judge. By that reasoning, criminal investigations will come to a halt. See *Zweibon IV*, 720 F.2d at 171. Nor should the Attorney General be required, at the risk of personal liability, to follow individual expressions of views by a minority of this Court, especially where, as in *Katz*, other members of the Court express seemingly contrary views and the Court itself specifically reserves decision on the question.[22] The Attorney General is the nation's chief law enforcement officer. It is his duty to enforce the law vigorously and aggressively, to "strike hard blows" but fair ones, as this Court once put it. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). If the Attorney General risks personal liability whenever he employs an investigative technique that some have brought into question, he will always have a strong incentive to err on the side of inaction. But that is exactly what *Harlow* sought to prevent. Unless it is clearly established that particular conduct is unlawful, the public interest is "better served by action taken 'with independence and without fear of consequences.'" *Harlow* v. *Fitzgerald*, 457 U.S. at 819 (citation omitted).

Finally, the district court held (Pet. App. 67a-69a) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, should have alerted petitioner that a warrant was required. However, *Keith* itself made abundantly clear that Title III "simply did not legislate with respect to national security surveillances" (407 U.S. at 306). After reviewing the language of Title III, the Court concluded that "Congress simply left presidential powers where it found them" in this field (*id.* at 303). The Court also found that the legislative history supported this interpretation

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[22] In *Zweibon IV*, the court of appeals similarly rejected the plaintiffs' attempt to "'poll' the Supreme Court Justices on the scope of the national security exemption as of 1970" (720 F.2d at 172).

(*id.* at 306-308). The district court simply ignored *Keith's* lengthy discussion of Title III.[23]

5. If this Court agrees that the denial of qualified immunity is appealable, we urge the Court to decide the merits of the qualified immunity question, rather than remanding that question to the court of appeals. Several factors support such a disposition. Petitioner's entitlement to qualified immunity is, we believe, beyond serious dispute. "The immunity question is a pure issue of law, appropriate for [this Court's] immediate resolution." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). The issue is simple and straightforward and has already been decided by several courts. Requiring still another lower federal court to address the question is most unlikely to shed any new light on the problem. In addition, if this Court decides in petitioner's favor on the issue of qualified immunity, there would be no need to reach the more difficult question of absolute immunity. At the same time, this meritless litigation, which began more than a decade ago, would be brought to an end. As Judge Weis stated in dissent below (Pet. App. 29a): "This litigation has lasted far too long. It should be terminated now."

## II. PETITIONER IS ENTITLED TO ABSOLUTE IMMUNITY FOR DECISIONS MADE TO PROTECT NATIONAL SECURITY

In *Harlow* v. *Fitzgerald*, 457 U.S. at 812, this Court stated:

> For aides entrusted with discretionary authority in such sensitive areas as national security or foreign

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[23] The district court relied (Pet. App. 68a) on *Zweibon* v. *Mitchell (Zweibon I)*, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976), in which the D.C. Circuit held that Title III does require a warrant for domestic security wiretaps. However, that court has since concluded that *Zweibon I* represented such a "sharp break in the law" that it should be given only prospective effect. *Zweibon III*, 606 F.2d at 1182. Thus, *Zweibon I's* interpretation of Title III, even if correct, would not be binding here.

> policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.

In this case, our remaining submission is that protection of the "unhesitating performance of functions vital to the national interest" requires that the Attorney General have absolute immunity from personal damages liability [24] for decisions—such as the one at issue here—made to protect the national security from threats such as violence, terrorism, subversion, or espionage.[25]

1. We are fully cognizant that claims for absolute immunity come to this Court with a substantial burden of persuasion. The inevitable immediate question is: why is qualified immunity insufficient? After all, by hypothesis absolute immunity seems to come into play only where qualified immunity leaves off—that is, where a government official has been shown to have violated a *clearly established* constitutional or statutory right. What

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[24] We call to the Court's attention that the factors that make this case a compelling one for absolute immunity may also create a doubt about an antecedent issue: whether a judicially-fashioned cause of action for damages under the Constitution should be recognized at all with respect to the Attorney General's national security decisions. "The Court, in *Bivens* and its progeny, has expressly cautioned * * * that such a remedy will not be available when 'special factors counselling hesitation' are present." *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 2, quoting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). See also *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 10; *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). In this case the "special factors" are, of course, those that in the body of our submission support a claim for absolute immunity.

[25] This case involved an intelligence-gathering national security wiretap undertaken primarily in order to *prevent* a threat to the national security from materializing. Thus, this case does not present the question whether a claim of absolute immunity should be recognized in connection with the normal criminal-investigation functions of the Attorney General when the crime relates to national security.

reason can there be for exempting government officials from liability in such a circumstance, where a willful flouting of the law has, by hypothesis, occurred?

Of course, it is the case that these questions arise whenever absolute immunity is claimed; nevertheless, this Court has concluded that absolute immunity should be extended to judges (see *Pierson* v. *Ray*, 386 U.S. 547 (1967)), prosecutors (see *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)), administrative law judges and administrative prosecutors (see *Butz* v. *Economou*, 438 U.S. at 508-517), and the President (see *Nixon* v. *Fitzgerald*, *supra*). In each of these cases, the Court understood that in some circumstances qualified immunity may be insufficient notwithstanding the superficial attractions of the argument that public officials should always be liable for actions that violate clearly established rights.

In fact the story of this case casts a dramatic light on why that argument obscures some fundamental considerations. In this case respondent seeks to make a former Attorney General of the United States personally liable for substantial money damages because that officer—faced with credible information that there might be terrorist attacks on federal facilities and on the person of the senior foreign-policy advisor of the President—determined that an immediate intelligence-gathering telephone tap was in order, and that under the law as it stood at that time he (the President's express designee in this area) did not need judicial permission to order such surveillance. Years later, a federal district judge persuades himself that this difficult question of constitutional law—one that had been expressly reserved by this Court and had divided some of its individual Justices, that had at that time never been passed on by an appellate court and had been unanimously decided the other way at the trial level—had, nevertheless, a "clear" answer (thus illustrating this Court's warning that "[i]n times of political passion, dishonest or vindictive motives are

readily attributed * * * and as readily believed" (*Tenney* v. *Brandhove*, 341 U.S. 367, 378 (1951)). Consequently he rules that the Attorney General violated "clearly established" constitutional rights and should pay compensatory (and perhaps punitive) damages out of his own pocket. The correctness of this ruling is, to be sure, subject to further review—but only (according to the court of appeals) after a full trial on the merits and, thereafter, at the discretion of this Court. In the meantime, according to the courts below (and notwithstanding *Harlow*), petitioner's thoughts and motives in evaluating the advice he received and taking the action he took will be subjected to the hindsight of exacting judicial scrutiny (here in the context of respondent's demand for punitive damages).

The difficulty is clear. From a retrospective viewpoint and in the abstract, there is an all too easy appeal to the assertion that public officials who have deliberately flouted clearly established rights should be liable. But, from the perspective of an official making a decision at the time he is making it—from the prospective viewpoint—things that may seem clear years later, in a wholly different legal and political climate, may not be clear at all. As this case shows, qualified immunity—which at first glance seems to be so precise, so "just"—creates risks and uncertainties of its own. And the question before the Court is: what balance of risks should an official have on his mind *at the time he has to make his decision, in an environment of uncertainty?* Under a regime of qualified immunity, a risk-averse official will be well advised to remember that ruinous personal liability may be the consequence if he guesses wrong, if a decision that now seems imperatively demanded by public policy and warranted by law will come later to be characterized by some federal court as the invasion of what by hindsight is said to be a clearly established legal right. He must also remember that a prolonged and agonizing process of litigation (12 years in this case) may in any event be in

prospect before he can be vindicated.[26] He must remember, too, that with respect to decisions made in the area of national security, he may be unable in the future to put on a complete defense: the information on which he is now relying may relate to matters that he will not be free to disclose in the event of future legal proceedings.[27] In sum, notwithstanding *Harlow*, the chilling effects of possible embroilment in litigation and possible personal liability continue to be substantial features of discretionary decisionmaking even under a regime of qualified immunity.

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[26] Although *Harlow* sought to avoid this result, we note that some lower courts have suggested that inquiries into a defendant official's subjective motives (which frequently will lead to a trial) still are required in "typical" qualified immunity cases. *Kenyatta* v. *Moore*, 744 F.2d at 1185; see also *id.* at 1185-1186; *Dandridge* v. *Police Dep't*, 566 F. Supp. 152, 160-161 (E.D. Va. 1983); compare *Hobson* v. *Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984) (discussing claims of "unconstitutional motive" after *Harlow*). While this is not the case to address this development, the conclusions reached by the courts in these cases certainly show that, even after *Harlow*, it continues to be "difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide even frivolous suits without protracted litigation." *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. at 12 (footnote omitted).

[27] This Court has held that " 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.' " *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1982), quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876). Congress too has recognized the grave problems that may be presented by litigation involving highly sensitive information. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801-1803(a) and (b) (creating special court), 1803(c) (creating special security measures); Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 549 *et seq.* (dealing with problem of "graymail"). If the Attorney General does not have absolute immunity in this area, he may be placed in the position of choosing between a ruinous judgment for damages and disclosing confidential information needed for his defense.

2. This Court's cases involving absolute immunity show that the Court has been sensitive to this ex ante perspective. The Court has concluded that in many—indeed most—situations it is desirable for government officials to err on the side of caution before taking actions affecting citizens' constitutional rights, and that the deterrent effect of exposure to possible liability for official misconduct is warranted. *Harlow* v. *Fitzgerald, supra; Butz* v. *Economou, supra.* But this has never been an all-encompassing principle: some officials in some settings should make their decisions without being inhibited and constrained by *private* financial considerations the outcome of which depends on a correct guess as to how the federal courts will, in the distant future, evaluate a past legal environment.

In *Nixon* v. *Fitzgerald, supra,* for example, the Court wrote (457 U.S. at 751-753) (footnotes omitted):

> Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. * * * [The need for immunity] is compelling where the office-holder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. * * * Cognizance of this personal vulnerability frequently could distract a President from his pubic duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve.

In *Harlow* the Court observed (457 U.S. at 812, 814):

> For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.
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> * * * * *

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty —at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).

See also *id.* at 812 n.18. Cf. *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 8 ("[T]he need for unhesitating and decisive action by military officers * * * would be undermined" by damages liability); and see *Butz* v. *Economou*, 438 U.S. at 512-513 ("[a]bsolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harrassment or intimidation"); *Imbler* v. *Pachtman*, 424 U.S. at 424 ("public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages"); *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951) (Frankfurter, J.) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. * * * The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial * * *.").

The need to view immunity questions from the perspective of the official who must make critical decisions with the potential for personal damages liability in mind was perhaps best expressed by Judge Learned Hand (*Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. * * * As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

And this Court, in citing Judge Hand's reasoning in *Nixon* (457 U.S. at 752 n.32) stated that "the prospect that damages liability may render an official unduly cautious in the discharge of his official duties" is "[a]mong the most persuasive reasons supporting official immunity." [28]

3. We submit that the need for "unhesitating" action by the Attorney General to protect the national security justifies absolute immunity in this limited sphere. The compelling public policy that demands this protection is not based on abstract notions but is grounded in "our con-

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[28] Surprisingly, the court of appeals in *Forsyth I* concluded that this Court was "unconcerned with this problem" (Pet. App. 101a) when *Butz* v. *Economou* was decided (but see 438 U.S. at 512, 515-516) and found, in *Forsyth II*, that nothing in *Nixon* or *Harlow* warranted reconsideration of its earlier immunity decision (Pet. App. 12a-13a). See also *Harlow* v. *Fitzgerald*, 457 U.S. at 814 n.23 (noting that "[t]he importance of this consideration hardly needs emphasis").

stitutional heritage and structure" (*Harlow* v. *Fitzgerald*, 457 U.S. at 813 n.20),[29] which confirm the critical importance of the President's national security responsibilities. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981), quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964). The President has "the fundamental duty, under Art. II, § 1 of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *Keith*, 407 U.S. at 310. The Court has stressed the need for "the utmost deference to Presidential responsibilities" in performing the central duties imposed by Article II (*United States* v. *Nixon*, 418 U.S. 683, 710 (1974)).[30] Indeed, in *Harlow* (457 U.S. at 811, 812 n.19) this Court acknowledged that, while "[t]he undifferentiated extension of absolute 'derivative' immunity to the President's aides" could not be justified, "a derivative claim to Presidential immunity would be

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[29] See also *Nixon* v. *Fitzgerald*, 457 U.S. at 748 n.26 ("Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of 'public policy,' the focus of inquiry more accurately may be viewed in terms of the 'inherent' or 'structural' assumptions of our scheme of government.").

[30] See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280 (sustaining Secretary of State's discretion in revoking a passport on the ground that the holder's activities threatened serious danger to United States' foreign policy and national security); *Weinberger* v. *Catholic Action*, 454 U.S. 139 (1981) (concluding that Navy was not required to prepare an Environmental Impact Statement with regard to the operation of a facility capable of storing nuclear weapons because an EIS would compromise national security); *United States* v. *Reynolds*, 345 U.S. 1 (1953) (recognizing the absolute nature of a governmental claim of state secrets privilege); see also *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (holding that courts should accord the "utmost deference" to executive claims of state secrets privilege).

strongest in such 'central' Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own."[31] And in suggesting that absolute immunity "might well be justified" to protect the "unhesitating performance of [national security] functions" (*id.* at 812), this Court made specific reference to the Attorney General's role in authorizing the national security surveillance that is involved in this case (*id.* at 812 n.19).

The Attorney General is the Cabinet officer principally responsible for taking preventive action to protect the national security against terrorism and other threats within our borders. He must approve any procedures for the collection, retention, or dissemination of intelligence information on United States citizens, resident aliens, groups, or companies. Exec. Order No. 12,333, para. 2.3, 3 C.F.R. 211 (1981). He has been delegated the sole power to approve warrantless arrests, searches, or seizures directed against a foreign power or its agents in situations where a warrant would normally be required for law enforcement purposes (*id.* para. 2.5), and was the President's express designee for authorizing national security wiretaps. See Memorandum for the Heads of Executive Departments and Agencies, dated June 30, 1965, *reprinted in United States* v. *United States District Court*, 444 F.2d at 670-671. The Federal Bureau of Investigation, an agency of the Department of Justice (28 U.S.C. 531), is the agency that has been designated "to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters" (28 C.F.R. 0.85(d)). In addition, with a few limited exceptions, the FBI is

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[31] It might be noted that President Nixon's immunity from suits seeking damages for warrantless wiretapping has been recognized. *Halperin* v. *Kissinger*, 578 F. Supp. 231, 233 (D.D.C. 1984) (an appeal in this case has been filed but does not challenge the Presidential immunity holding).

also the only agency authorized to gather intelligence information within this country (Exec. Order No. 12,333, para. 2.3(e)), 3 C.F.R. 211 (1981). Finally, the Attorney General, alone among cabinet officers, has the added responsibility of deciding, as the President's chief legal representative, which of the responses available to combat a national security threat fall within the President's powers under the Constitution (see 28 U.S.C. 511-513).[32]

In the critically important and sensitive field of national security, the balance of competing considerations weighs in favor of absolute immunity from damages liability for the Attorney General.[33] The day is long past

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[32] This responsibility is itself grounded in the Constitution and reflects the historically central role of the Attorney General, dating from the creation of that office in the First Judiciary Act of 1789 (Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92). This role of the Attorney General is highly important, particularly where the scope of the President's constitutional obligations is unclear, because the President cannot look to the Judicial Branch for advice. This principle was established early on, when Chief Justice Jay declined a request of President Washington. Citing the President's power under Article II to "require the Opinion, in writing, of the principal Officer in each of the executive Departments" (U.S. Const. Art. II, § 2, Cl. 1), the Chief Justice explained:

> [The lines of separation drawn by the Constitution between the three departments of government] being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

3 H. Johnston, *The Correspondence and Public Papers of John Jay* 488-489 (1891).

[33] It is our submission that the Attorney General is entitled to absolute immunity for actions taken to protect national security because he acts on behalf of the President in exercising a wide discretionary authority in this field. We are not contending that the same considerations would necessarily support absolute immunity for lower level officials with more restricted and less important responsibilities in this field.

when the possibility of acts of violence and terrorism directed at the nation's government and leadership can be easily dismissed; and the potential consequences of inaction are too great to permit personal financial considerations (and other consequences of protracted litigation) to interfere with the vigorous and unhesitating performance of the Attorney General's duties. The factors that led this Court to conclude that Cabinet and other executive officers do not enjoy blanket absolute immunity simply do not apply in this specialized area. It is one thing for an executive officer to pause and assess his potential liability when performing the routine functions of his agency—*e.g.*, revoking the registration of a commodities futures trading company (*Butz* v. *Economou*, *supra*) or discharging a subordinate government employee (*Harlow* v. *Fitzgerald*, *supra*). It is quite another thing for the Attorney General to dwell on such personal considerations when dealing with a national security threat.

In the present case petitioner was confronted with a plot to blow up important federal facilities. More ominously, he was faced with a threat to kidnap Henry Kissinger, who, as Assistant to the President for National Security Affairs, was a principal advisor to the President on defense and foreign affairs matters, and who was then conducting secret negotiations to end the war in Vietnam. (What was in question was both Mr. Kissinger's safety and also the possible compromising of highly sensitive security and diplomatic information.) The need for prompt and decisive preventive action was clear. Petitioner concluded that a warrantless telephone tap would be lawful. Our contention is that, in such a context, to subject him to the incremental deterrent effects of possible burdensome litigation and potential heavy personal liability would be undesirable and counterproductive.

4. Is it a serious objection to absolute immunity in this context that it would make the Attorney General

unaccountable even for actions that are wholly egregious? Would a rule of absolute immunity in the national security area encourage our Attorneys General to rush to do violence to our citizens' constitutional rights? We do not believe so.

First, immunity from personal damages actions is not the equivalent of immunity from all legal, political and personal consequences; liability for damages is not the only (or even most effective) deterrent to willful official misconduct.[34] Injunctive and declaratory judgment actions may be brought; evidence seized illegally and in bad faith may be suppressed or excluded from evidence. Congressional inquiry and oversight, dismissal from office, impeachment, and criminal prosecution are all available, and, in the case of an officer such as the Attorney General, not to be lightly discounted. Public and press criticism and political retribution are also powerful deterrents against flagrant abuses.[35]

More important, even, are the many personal, psychological and ethical constraints that animate the vast majority of our public officers. Most of our executive officials are no more minded to engage in purposeful violations of the Constitution and egregious invasions of our citizens' privacies than are our legislators or judges. Deterring the occasional malevolent official is important;

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[34] See T. Madden & N. Allard, *Advice on Official Liability and Immunity, reprinted in* 2 Administrative Conference of the United States, *Recommendations and Report—1982*, at 209 ("[M]ost observers today agree that [the existing system of civil sanctions for official misconduct] fails to serve two of its primary goals—measured deterrence of official misconduct, and adequate compensation of the victims of such misconduct.")

[35] Moreover, the Attorney General, like the prosecutor in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) and the agency attorney in *Butz* v. *Economou*, 438 U.S. at 515-517, "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amendability to professional discipline by an association of his peers" (424 U.S. at 429).

but to create systems of deterrence that in turn will constrain and hamper our conscientious and law abiding ones when they are acting in a context that involves the safety and security of our country's leaders and institutions would be tragic.

5. The Court has already held that the Attorney General is absolutely immune from damages liability when he performs the function of a prosecutor. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). The Court observed (*id.* at 424-425) that "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages" (*Imbler* v. *Pachtman*, 424 U.S. 409, 424-425 (1976)). The Court also noted (*id.* at 430-431 & n.33) the difficulty of drawing the line between prosecutorial responsibilities, for which absolute immunity is extended, and "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer," for which only qualified immunity may be available.

We submit that the Attorney General's vital responsibilities in connection with intelligence gathering and prevention in the field of national security are at least as deserving of absolute immunity as routine prosecutorial actions taken either by the Attorney General himself or by subordinate officials.[36] When the Attorney General is called upon to take action to protect the security of the Nation, he should think only of the national good and not about his pocketbook. Accordingly, absolute immunity is appropriate in this limited area.

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[36] We note that this court has recognized the different interests that inhere in national security intelligence gathering (as distinguished from criminal investigations), where "the emphasis * * * is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency" (*Keith*, 407 U.S. at 322).

## CONCLUSION

The judgment of the court of appeals should be reversed and the case should be dismissed.

Respectfully submitted.

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No. 84-335

In The

# Supreme Court of the United States

October Term, 1984

JOHN N. MITCHELL,

*Petitioner,*

v.

KEITH FORSYTH,

*Respondent*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a damages suit against a public official.

2. Whether petitioner was entitled to qualified immunity in this case.

3. Whether the Attorney General is entitled to absolute immunity for his authorization of warrantless domestic national security electronic surveillances.

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No. 84-335

In The
# Supreme Court of the United States
October Term, 1984

JOHN N. MITCHELL,

*Petitioner,*

v.

KEITH FORSYTH,

*Respondent*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## BRIEF FOR THE RESPONDENT

### STATEMENT

In this interlocutory proceeding petitioner, former Attorney General John N. Mitchell, claims that he is entitled to absolute or qualified immunity from suit for his authorization of warrantless electronic surveillances that resulted in the indisputably unlawful and unconstitutional overhearings of respondent's telephone conversations.

The wiretap in question was directed at one William Davidon and was intended to secure information concerning the East Coast Conspiracy to Save Lives (ECCSL).[1] In June, 1970, the FBI learned from an informer that members of this group had allegedly discussed a plan to damage underground heating systems in Washington, D.C., to further their political opposition to the war in Vietnam. At the same time, the FBI was informed that ECCSL may have been responsible for several draft board raids.

In August, 1970 this informer asserted that three persons, including Davidon, had discussed the possibility of kidnapping Dr. Henry Kissinger. A high level FBI official described these discussions as only "rhetorical". I.J.A., Ct. App. 143.[2] Moreover, it was clear that the earliest possible date for any attempt to implement any of these "plans" was February, 1971. *Id.*, 153. The FBI and Secret Service closely monitored this case through the informant and took steps necessary to prevent any harm to property or persons. A full scale criminal investigation was initiated in September, 1970, and indictments against eight alleged co-conspirators (not including respondent) were returned in January, 1971.

The wiretap in question, authorized by petitioner on November 6, 1970 was placed on November 24, 1970, and was terminated on January 6, 1971. It was effectuated without prior judicial approval, notwithstanding the rec-

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[1]A more detailed factual description of the events surrounding the authorization of the wiretap is set forth at pp. 28-34 *infra*.

[2]J.A. Ct. App., refers to the Joint Appendix in the court of appeals (Volumes I and II).

ommendation of a Justice Department prosecutor to secure a judicial order under Title III, 18 U.S.C. §§ 2510-2520. *Id.*, 193. Respondent Keith Forsyth was overheard on three occasions during the course of the contested wiretap. None of his conversations were in any way related to any alleged criminal wrongdoing or to any national security matter. Petitioner made no attempt to minimize the overhearings of *any* conversation monitored over this two month period and, as a result, the overhearings included numerous conversations plainly outside the stated purpose of the surveillance.

This action was filed in 1972 and sought damages for violations of respondent's rights under the Constitution and under Title III. Following discovery, the district court denied cross-motions for summary judgment. Pet. App. 117a.

Petitioner filed an interlocutory appeal from the denial of the summary judgment motion. The court of appeals ruled that the denial of qualified immunity was not a final judgment and therefore not appealable. With respect to the claim for absolute immunity, the court remanded for a hearing on the question of whether petitioner was absolutely immune from suit. Pet. App. 83a.

Applying *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the district court denied petitioner's claims to immunity and ruled that respondent was entitled to summary judgment. Pet. App. 52a.

In resolving this issue, the district court merely assumed that the surveillance was for national security purposes (Pet. App. 59a), and because it denied qualified immunity, did not find it necessary to decide: (1) whether

there was a legitimate national security basis for this surveillance; (2) if so, whether the primary purpose of the surveillance was for national security or criminal investigatory purposes; (3) whether Title III was violated and, if so, whether damages could be awarded under that statute; and (4) whether the Fourth Amendment's reasonableness requirement was violated by petitioner's failure to minimize the overhearings. Each of these issues would need to be remanded in the event this Court reached the merits of this appeal and ruled in favor of petitioner on either immunity claim. By the same token a determination that the surveillance was not for legitimate national security reasons would moot the questions upon which *certiorari* was granted.

After the district court scheduled a hearing on damages,[3] petitioner requested certification of the liability issue under 28 U.S.C. § 1292(b). The motion was denied by the district court.

The court of appeals held that petitioner was not entitled to absolute immunity. The court ruled that petitioner had produced no evidence on remand to support a claim under *Imbler v. Pachtman*, 424 U.S. 409 (1976) and further held that petitioner's claim to a "special functions" basis for immunity was inconsistent with the Court's ruling in *Butz v. Economou*, 438 U.S. 478 (1978).

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[3]The hearing on damages would have been limited to a legal determination of respondent's claim to liquidated damages and attorney's fees under § 2520 and/or a claim for compensatory damages under the Fourth Amendment. *Cf. Carey v. Piphus*, 435 U.S. 247 (1978). Prior to the submission of the Petition for Certiorari, counsel for respondent informed trial counsel for petitioner that no claim for punitive damages would be made at the damages hearing. We confirm that position in this Court.

The court of appeals held that the denial of the claim of qualified immunity was not appealable under the collateral order doctrine, interpreting "*Harlow* as encouraging the summary disposition of insubstantial claims . . ., not as relaxing the rule limiting interlocutory appeals." Pet. App. 14a. The court also expressed its concern that allowing interlocutory appeals on this issue would greatly burden the courts of appeals. Judge Weis dissented and would have decided the merits of qualified immunity in favor of petitioner.

A petition for rehearing en banc was denied on April 3, 1984.

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## SUMMARY OF ARGUMENT

### I.

Under the collateral order doctrine a party must demonstrate that the issue upon which interlocutory appeal is taken (1) resolves an important issue that is separable from the merits of the action, (2) is effectively unreviewable on direct appeal, (3) is conclusively determined, and (4) creates only a narrow class of cases subject to appeal. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

Qualified immunity is not an issue that is collateral to the merits of the case. In contrast to the absolute immunity defense which is determined solely on a completely collateral issue (status and function of the defendant), qualified immunity decisions must include an analysis of the constitutional right asserted, the history of the right in

the courts, and the facts that are alleged to have implicated that right. All of these factors are equally relevant to the underlying merits of the case. In all significant respects, this defense is analytically and functionally equivalent to a motion to dismiss for failure to state a claim on the merits. Such motions are not appealable on an interlocutory basis. *Abney v. United States,* 431 U.S. 651 (1977).

Furthermore, as petitioner concedes, the qualified immunity issue will in some cases, "turn on disputed facts," Brief, 24, n.16, thus precluding interlocutory appeal. In many cases it will not be apparent whether these factual conflicts exist and therefore dividing the issue between "legal" and "factual" qualified immunity appeals will not be possible. Indeed, this case presents such a disputed factual issue, since the district court did not resolve the threshold question of whether there was a legitimate national security predicate for this surveillance. Moreover, since a determination of a purely legal qualified immunity defense will generally resolve the issue of liability, an interlocutory appeal is unnecessary to protect the defendant.

This Court's instruction that insubstantial claims not proceed to trial does not mean that all pre-trial decisions, which if decided in the favor of governmental defendants would terminate the litigation, are thus appealable on an interlocutory basis. Absolute immunity protects against the trial itself, no matter how substantial the underlying constitutional claim, while qualified immunity necessarily recognizes that either factually or legally substantial cases shall go to trial.

As a practical matter, expansion of the collateral order doctrine will cause a substantial increase in interlocu-

tory appeals, particularly because any defendant can claim that the right was not clearly established.

## II.

Respondent's right to be free from warrantless electronic surveillance under the Fourth Amendment and Title III, 18 U.S.C. § 2510, et seq., was clearly established in 1970. This is conceded to be true if there was no national security interest involved, but even if such an interest is proven, *Katz v. United States,* 389 U.S. 347 (1967) made clear that electronic surveillance, like all searches, are subject to the warrant requirement. All searches conducted outside the judicial process are *per se* unreasonable, unless an exception to the warrant requirement had been established. Here, petitioner was seeking to establish a ***new*** exception to the Fourth Amendment in the face of clear precedent that national security does not exempt the executive from constitutional restraints or judicial review.

To the extent any issue was open, it was the question of whether *foreign* security surveillances were subject to the warrant requirement, a fact that was made clear to petitioner by Solicitor General Erwin N. Griswold.

Petitioner also violated clearly established Fourth Amendment law by failing to minimize the overhearings to national security matters. *See Berger v. New York,* 388 U.S. 41, 59-60 (1967).

Petitioner also violated Title III and therefore is liable for damages under 18 U.S.C. § 2520. § 2511(3) only exempted national security surveillances from the remedial aspects of Title III where the Executive in fact had the constitutional power to conduct such surveillance.

*United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), expressly rejected any such claim to constitutional exemption; therefore, the procedures and remedies of Title III were applicable.

## III.

Petitioner's claim to absolute immunity is without support. First, with respect to the statutory claim, since Title III clearly covers all persons who engage in illegal wiretapping, official or absolute immunity was waived. Further, Congressional repeal of § 2511(3) removes any colorable claim that national security surveillances are not subject to Title III. Since the Attorney General would face trial on a statutory claim for warrantless national security surveillances, and because the Attorney General can make no claim to a constitutionally based immunity, the purported policy reasons for absolute immunity on the constitutional cause of action are irrelevant.

In addition, applying the stringent test this Court has developed in determining the appropriateness of a claim to absolute immunity, it is clear that the specific function he exercised is not one committed to the sole discretion of the Executive. To the contrary, as *Keith* emphatically confirms, a decision to employ electronic surveillance even in a domestic security area, requires prior judicial approval. Application of the absolute immunity doctrine would preclude any judicial review and is thoroughly incompatible with constitutional principle and sound public policy. Qualified immunity provides the Attorney General with very broad protection against liability and given the explicit commands of Title III and *Keith*, there is no basis

for his claim that he should be immune for deliberately violating settled law.

## ARGUMENT

### I. QUALIFIED IMMUNITY IS NOT SUBJECT TO INTERLOCUTORY APPEAL UNDER THE COLLATERAL ORDER DOCTRINE.

The rule that a party may not appeal under 28 U.S.C. § 1291 until the district court litigation is concluded on the merits "is an historic characteristic of federal appellate jurisdiction." *Flanagan v. United States,* — U.S. —, 103 S.Ct. 1051, 1054 (1984). It represents the "firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States, supra* at 656.

A narrow exception to that rule permits interlocutory appeals in a "small class" of cases in which an order, though technically not final (1) resolves an important issue that is collateral or separable from the merits of the action, (2) is effectively unreviewable on direct appeal, (3) conclusively determines the disputed questions, and (4) creates only a narrow class of cases subject to appeal. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981); *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978). We submit that petitioner has failed to show that an order denying a motion for summary judgment based on qualified immunity meets any of these tests.

### A. The Defense Of Qualified Immunity Is Not Separable From Nor Collateral To The Merits Of The Case.

This Court has consistently insisted that an order, to be considered collateral, must "not [be] enmeshed in the factual and legal issues comprising plaintiff's cause of action." *Mercantile National Bank v. Langdeau,* 371 U.S. 555, 558 (1963). Applying this test, it is not difficult to see why absolute immunity claims are collateral, while qualified immunity claims are not. Absolute immunity is determined solely on an issue genuinely collateral to the merits—the status and the function of the defendant, but qualified immunity is inextricably tied to the determination on the merits—the nature of the wrongful act and the law applicable at the time. The qualified immunity issue cannot be decided without an analysis of what right the alleged conduct is said to violate, of whether the claimed violation does indeed implicate a constitutional right, and of the history of the constitutional principles in question. This inquiry is plainly intertwined with the issue of whether the right asserted exists at all.

In this sense, qualified immunity—the lack of established law—serves a closely analogous role to a Rule 12(b) (6) motion to dismiss. Both apply an objective legal analysis and both are dependent on the facts and circumstances of the case—not the status of the defendant. Indeed, the only difference between the two is that a motion to dismiss on the merits is dependent upon whether the facts set forth a constitutional violation, while qualified immunity is dependent upon whether the right was clearly established at the time of the incident. A motion to dismiss for failure to state a claim is not collateral "in any

sense of that term; rather, it goes to the very heart of the issues to be resolved at the upcoming trial." *Abney v. United States, supra* at 663. The same must hold true for a motion based on qualified immunity.

Furthermore, as petitioner recognizes (Brief, 24-26, and n.16), the issue of qualified immunity may arise in significantly different contexts. Where the facts are undisputed petitioner argues for interlocutory review; where a qualified immunity claim turns on disputed facts, petitioner concedes that review is inappropriate.

Initially, petitioner fails to recognize the wide variety of cases in which there may be a sharp factual conflict with respect to the threshold issue of the purpose of the defendant's actions (here, whether there was a legitimate national security predicate for the surveillance, see pp. 28-34, *infra.*) In many cases if a defendant acted with an improper purpose, the qualified immunity issue is never reached. Consider, for example, where a plaintiff alleges a deprivation of First and Fourth Amendment rights based on an unlawful arrest for peaceful protest. In *Pierson v. Ray,* 386 U.S. 547, 557-58 (1967), this Court ruled that an officer could not be liable for making arrests under a statute only later declared unconstitutional, but remanded for trial on the issue of whether the arrest was in fact predicated on an attempt to prevent imminent violence or, as plaintiffs argued, to enforce clearly unconstitutional racial segregation where no threat of violence existed.

In *Harlow,* the Court remanded for a similar determination, and this important distinction has been consistently followed in the lower courts. See, e.g., *Hobson v.*

*Wilson*, 737 F.2d 1 (D.C. Cir. 1984) (whether surveillance of and other actions against plaintiffs was undertaken for political or legitimate law enforcement purposes); *Benson v. Scott*, 734 F.2d 1181, 1185-86 (7th Cir.), *cert. denied*, 83 L.Ed.2d 361 (1984) (whether refusal to supply plaintiff with legal representation caused by plaintiff's exercise of First Amendment rights); *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984) (issue on immunity motion whether defendant's actions "undertaken in order to disrupt" exercise of rights and whether taken with "racial animus").[4]

Petitioner's submission that interlocutory appeals should be allowed in cases without these factual disputes, is highly impractical. How is a court of appeals to determine in advance of a complete review of the case whether there are disputed facts on the qualified immunity issue? The issues are not nearly as neatly divisible as petitioner would suggest, and the full resources of the court of appeals would have to be expended *before* it was determined that disputed facts precluded review.[5]

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[4]Defendants can also claim "extraordinary circumstances" to excuse their neglect of clearly established rules of law. *Harlow, supra* at 819. This claim will often raise factual issues that are inappropriate for summary judgment, and certainly should not be the basis for an interlocutory appeal. See *Keynatta v. Moore, supra*.

[5]A good example of this problem is provided by *Keynatta v. Moore, supra*, where the court of appeals, in refusing to hear this issue on an interlocutory basis, noted that the court's full review of the record revealed clear factual conflict (e.g., whether there was invidious racial discrimination), which in any event would have necessitated a remand. Notwithstanding this fact, the Department of Justice has now petitioned for rehearing in that case. That some constitutional violations require a showing of a defendant's state of mind is another factor that will

(Continued on following page)

Furthermore, in those cases where, as here, a constitutional violation is conceded and the only issue is the status of the law at the time of the incident, a denial of a defendant's motion for summary judgment will often render unnecessary any further proceedings on liability. By definition, the right was violated, no factual issues need be resolved and the merits are thus decided. Thus, further proceedings will only be necessary in those cases where punitive damages are requested. The number of cases in which plaintiff will vigorously pursue punitive damages and yet defendants are correct that plaintiff's constitutional rights were not clearly established will be quite small.[6]

### B. The Order In Question Is Effectively Reviewable On Direct Appeal.

Petitioner's further effort to equate absolute and qualified immunity claims must fail because qualified immunity does not share the attributes, from either a conceptual or practical viewpoint, that warrant applying the collateral order doctrine to absolute immunity claims.

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often preclude summary judgment. See, *Washington v. Davis*, 426 U.S. 229 (1976) (intent to discriminate); *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference).

Moreover, *Harlow's* insistence that qualified immunity be decided before discovery, will make it difficult in some cases to determine the exact dimensions of the factual conflict.

[6]*Abney v. United States, supra* at 659, also requires a "complete, formal and, in the trial court, a final rejection" of the defendant's claim. Surely, in those cases where qualified immunity is denied, but factual issues as to the defendant's culpability must still be resolved at trial, there has not been this "complete" and "final" resolution of the claim.

An "absolute immunity" claim *must* be reviewed on appeal before trial because it is intended to provide an absolute protection against that very trial. Such immediate review is not necessary—and therefore should not be permitted—to preserve the integrity of "qualified immunity" because it is only an affirmative defense against liability in damages, *Harlow, supra* at 815, and, like all such defenses, is sufficiently protected by appellate review after final judgment.

The Court's cases recognize the critical significance of the "absolute" nature of the right at stake. For example, in *Abney v. United States, supra* at 661, defendant asserted rights protected by the Double Jeopardy Clause of the Fifth Amendment—which the Court described as "a guarantee against being twice put to *trial* for the same offense." In other words, the defendant was "contesting the very authority of the Government to hale him into court to face trial." *Id.*, at 659. That claim would necessarily be "effectively unreviewable," *Coopers & Lybrand v. Livesay, supra* at 468, if the defendant had to wait until after trial for appellate review. 431 U.S. at 662. See also *Helstoski v. Meanor,* 442 U.S. 500, 508 (1979) (the Speech or Debate Clause designed to protect Congressmen not only from the consequences of litigation's results but also from the burden of defending themselves.)

By comparison, the claim of qualified immunity, like many issues which may be dispositive if successfully urged by a moving party, must await final judgment for appeal if wrongly decided by the district court. Motions to dismiss based on failure to state claims, statute of limitations, collateral estoppel, res judicata, laches, and lack of jurisdiction, to name a few, if successful will end the litigation before trial, but none are subject to interlocutory appeal.

Petitioner places much emphasis on this Court's admonition in *Harlow* that "insubstantial" claims should not proceed to trial. But *Harlow* also stressed that even where governmental officials are defendants, substantial and meritorious actions should be tried. This Court has not defined the term "insubstantial" in this context. However, where a district court has held that the rights were clearly established, the deference ordinarily shown to trial court rulings compels the conclusion that the claim is not "insubstantial" even if an appellate court would ultimately reverse.[7]

In *Kenyatta v. Moore, supra* at 1184, the court stated:

> The denial of a claim that does not encompass the right to be free from trial is not immediately appealable. The expense and strain of a trial are vicissitudes that affect every party, plaintiff or defendant, who is denied a summary judgment and then must undergo a trial. The trial itself trangresses the interests protected by qualified immunity only if the claim is insubstantial, and the defendant-official has nothing to appeal if he has failed to persuade a district judge that his defense is well-founded. . . . few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights, far too few to invoke the *Harlow* policy of preventing the risk of litigation from deterring good candi-

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[7]In *Harlow,* the Court stressed that it was not providing "license to lawless conduct . . . where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.* at 819. Respondent's claim, far from being "insubstantial," is premised on the most basic and important principles under the First and Fourth Amendments. His rights *were* violated and the only issue is whether petitioner should be relieved from damages liability.

> dates from seeking office or good office holders from performing their duties.

See also *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984).

Closely allied to the requirement that the order not be effectively reviewable on appeal is the principle that some irreparable harm be demonstrated as a requisite to interlocutory appeal. *Cohen, supra* at 546; *Firestone Tire & Rubber Co. v. Risjord, supra* at 378. In this case, the only unresolved issue is that of damages. No further hearings or testimony were necessary in the district court since respondent does not seek punitive damages, and compensatory damages will be awarded either as liquidated damages under 18 U.S.C. § 2520 or on a theory of constitutional deprivation. See n.3, *supra*.[8]

Finally, petitioner's attempt to cast his defense as qualified immunity from trial, Brief at 16, as opposed to a qualified immunity from damages liability, is unavailing given this Court's explicit statements to the contrary. Qualified immunity protects a defendant from an award of damages and not from a finding of liability for unconstitutional conduct. In *Davis v. Scherer*, — U.S. —, 104

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[8]It should also be noted that appeal may be had by certification under 28 U.S.C. § 1292(b). In this case, certification was denied because the trial court found, correctly we suggest, that such an appeal would not advance ultimate termination of the litigation, since only a determination of damages was left. Pet. App. 48a-49a. It is more than ironic, of course, that this litigation would have *concluded* in the trial court in 1979, had it not been for petitioner's two interlocutory appeals. Thus, petitioner's suggestion, Brief, 17, n.9, that "suits frequently linger in the trial court for inordinate periods" because of a failure to apply qualified immunity standards is surely disingenuous. See also *Kenyatta v. Moore, supra* (government appeals have delayed resolution for over six years).

S.Ct. 3012, 3018 (1984), the Court assumed that the plaintiff's due process rights had been violated:

> This finding of the District Court . . . *resolves the merits* of appellee's underlying claim for relief under § 1983. It does not, however, decide the issue of damages. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from *liability for damages* unless it is further demonstrated that their conduct was unreasonable under the applicable standard. (emphasis added).

See also, *O'Connor v. Donaldson,* 422 U.S. 563, 577, n.12 (1975).

### C. Expansion of The Collateral Order Doctrine To Include The Qualified Immunity Defense Will Cause A Substantial Increase In Interlocutory Appeals.

An important limitation on the collateral order doctrine is that it apply only to a "small class of interlocutory orders." *Nixon v. Fitzgerald, supra* at 742. Because the same qualified immunity defense raised by petitioner in this case is also asserted by many civil rights defendants, the class of qualified immunity cases is anything but small.[9] Qualified immunity is not a self-limiting doctrine since any defendant can claim that the right involved was not clearly established. *Cf. United States v. MacDonald,* 435 U.S. 850, 861-62 (1978). By comparison, cases involv-

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[9]Statistics compiled by the United States Judicial Conference reveal that in the 12 month period ending June 30, 1983 there were over 38,000-civil rights cases (including prisoner cases) filed in the district courts. 1983 *Reports of the Proceedings of the Judicial Conference of the United States [and the] Annual Report of the Director of the Administrative Office of the United States Courts,* Table C-3, "United States District Courts Civil Cases Commenced, By Nature of Suit and District As of June 30, 1983" at 248-249.

ing Double Jeopardy Clause immunity, *Abney v. United States, supra,* Speech or Debate Clause immunity, *Helstoski v. Meanor, supra,* or Presidential immunity are rare, precisely because they are self-limiting.

Petitioner urges immediate appellate review where a district court denies a qualified immunity defense. And it is highly likely that the defendant who is permitted to appeal will do so. Even if the appeal is unsuccessful on the merits, the defendant will have delayed the trial court proceedings, and the plaintiff will have suffered "the obstruction to just claims . . . the harassment and cost" of the interlocutory appeal. *Firestone Tire & Rubber Co. v. Risjord, supra* at 374.

As recognized by the Court below:

> "The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. [We] fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss [would] open the sluices to a flood of interlocutory appeals crushing us even further under a weight of our own making." Pet. App. 15a.[10]

Moreover, that "crushing" impact on the appellate docket is almost entirely avoidable, since in many cases a denial

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[10]The argument that the appellate load would not be greatly increased because "it is not uncommon for defendant officials to assert claims of both absolute and qualified immunity," Brief, 18, is insupportable. Both *Bivens* and § 1983 suits would be subject to interlocutory appeals and the overwhelming number of these suits involve defendants who have no colorable claim to absolute immunity.

Further, *Abney v. United States, supra* at 662-63, specifically rejects the notion that the appealability of one issue can support interlocutory appeal of any other issue.

of qualified immunity will never reach the court of appeals for review, but rather will be incorporated into other resolutions of the case before appeal (e.g., settlement, defendants' success on other dispositive motions, judgment for defendants on the merits).[11]

## II. PETITIONER VIOLATED RESPONDENT'S CLEARLY ESTABLISHED CONSTITUTIONAL AND STATUTORY RIGHTS.

### A. Petitioner Knew Or Should Have Known That The Fourth Amendment Required A Warrant For Domestic National Security Electronic Surveillance.

In asserting a qualified immunity from liability in damages, petitioner claims that with respect to this surveillance the Fourth Amendment warrant requirement was not clearly established.[12] We submit that after *Katz v.*

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[11]Petitioner's assertion that he knows of no *federal* defendant who has taken an appeal from a denial of qualified immunity in the D.C. Circuit for the past two years is meaningless. The great majority of constitutional cases are against *state* officials under § 1983 and any rule announced in this case would be applicable in § 1983 litigation. See *Harlow, supra* at 818, n.30. In addition, in many cases, the appeal will involve no significant legal issue; rather, it will only involve the issue of whether the district court properly applied settled legal principles. *Cf. Nixon v. Fitzgerald, supra* at 743 (case involves "serious and unsettled questions.") Again, this kind of issue cannot be made grounds for interlocutory appeal without allowing virtually any pre-trial matter to come within the collateral order doctrine. See also *Firestone Tire & Rubber Co. v. Risjord, supra* at 379 (policy against interlocutory appeals based in part on respect for integrity of district courts).

[12]This argument assumes a fact not yet decided in this litigation: whether there was a legitimate national security predicate for this surveillance. See Point II B, *infra*. If this Court rules that a qualified immunity issue is appealable on an interlocutory basis, both issues should be remanded for a ruling on the merits. See *Harlow, supra* at 820.

*United States, supra,* it was clearly established that any warrantless search or electronic surveillance was unreasonable *per se,* except for limited exceptions that did not cover this case. Furthermore, to the extent any issue was open, it was the validity of warrantless taps to gather *foreign intelligence information.*

1. In this case, respondent's complaint rests on a cardinal principle of our constitutional system: that a government official may not conduct searches and seizures without prior judicial approval except in limited, specifically designated circumstances. If an exception to the warrant requirement has not been articulated, the Fourth Amendment requires a warrant before a person's privacy can be invaded. See *Thompson v. Louisiana,* 53 L.W. 3396 (U.S., Nov. 26, 1984); *Coolidge v. New Hampshire,* 403 U.S. 443, 454 (1971). The Court's construction of the Fourth Amendment gave petitioner no basis to believe that his actions in this case were lawful.

Well before the decision in *Katz v. United States,* 389 U.S. 347 (1967), the Court had made it unmistakably clear that it is the "*point* of the Fourth Amendment" that searches be authorized in advance by a "neutral and detached magistrate," except for narrowly drawn exceptions. *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Indeed, in *Thompson v. Louisiana, supra* at 3397, this Court again recognized the venerability of this rule:

> As we stated in *United States v. Chadwick,* 433 U.S. 1, 9 (1977), "in this area we do not write on a clean slate." In a long line of cases, this Court has stressed that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth

> Amendment—subject only to a few specifically established and well delineated exceptions." *Katz v. United States,* 389 U.S. 357 (1967) (footnotes omitted). *This was not a principle freshly coined for the occasion in Katz,* but rather represented this Court's long-standing understanding of the relationship between the two clauses of the Fourth Amendment. (emphasis added, footnote omitted).

See also *United States v. Jeffers,* 342 U.S. 48, 51 (1951) ("the burden is on those seeking [an] exemption to show a need for it.")

In *Katz* the Government claimed—as petitioner claimed with respect to this tap—that because its agents did no more than they might have done with prior judicial sanction, the search was proper. But the critical flaw in this assertion was that "this restraint was imposed by the agents themselves, not by a judicial officer." 389 U.S. at 356. They were not required to go before a detached, neutral magistrate. They were not compelled to observe precise limits established in advance by a specific court order. They were not required to notify the authorizing magistrate after the search had been completed of all that had been seized.

*Katz* applied settled constitutional standards in rejecting the government's request—not for exemption under an established exception—but for the creation of a "*new* exception" to the warrant requirement. *Id.* at 358 (emphasis supplied). Similarly, the Court's reservation of the claim that "safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security," *id.* at n.23, simply took note of the government's claim to a new excep-

tion in that area. *Keith* rejected the argument "that the special circumstances applicable to domestic security surveillances *necessitate a further exception* to the warrant requirement." *Id.* at 318 (emphasis added). Accordingly, as no exception to the settled law under the Fourth Amendment had been created in the area of national security, petitioner violated clearly established constitutional law. As Judge Swygert stated in *Zweibon v. Mitchell,* 720 F.2d 162, 175 (D.C. Cir. 1983) (dissenting opinion):

> Mitchell chose to ignore the principle on which *Katz* turned, apparently gambling that later Supreme Court decisions might limit the universality of *Katz* by establishing exceptions in national secuirty situations. Under the *Harlow* standard, however, government officials who depart from "settled, indisputable law" in the hope that an exception will later be created justifying their conduct do so at their peril. (footnote deleted).

2. The long-standing and clearly established protections that the Fourth Amendment provides against Executive invasions of privacy and political dissent were made clear in *Keith:*

> Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals who the officer might conclude were guilty of seditious libel.
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> • • •
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> "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power," *Marcus v. Search Warrants etc.,* 367 U.S. 717, 724. History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its

> policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

*Id.* at 313-314; 316.

This history, particularly in cases involving seditious libel, was a clear signal to petitioner that any attempt to create a new exception based on "national security" would be repugnant as well to closely related First Amendment doctrine. Petitioner sought to avoid Fourth Amendment restrictions in cases involving political dissidents, where clear first amendment interests were at stake, and did so under an unconstitutionally vague definition of national security.[13]

Furthermore, well before petitioner embarked upon his campaign to seek exemption from the Fourth Amendment, this Court had made it clear that an Executive claim to suspend or avoid constitutional protections in cases of national security would be found unconstitutional. See *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).

In *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952), the Court refuted the claim for inherent power. Justice Frankfurter concurred (at 613):

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under

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[13]Petitioner defined national security interests as "those interests which protect the national security [and] they would range over very, very wide areas." II J.A. Ct. App. 96.

> restrictions from which other governments are free. It has not been our tradition to envy such governments.

Would petitioner have asserted a national security power to dispense with the warrant requirement when physically searching homes or personal papers? Would he have asserted this power to arrest "subversives" without probable cause, or to unilaterally suppress dissident organizational activity or the press? Obviously he could not. See, e.g., *New York Times Co. v. United States,* 403 U.S. 713 (1971); *United States v. Robel,* 389 U.S. 258 (1967); *Duncan v. Kahanamoku,* 327 U.S. 304 (1946); *Mitchell v. Harmony,* 54 U.S. (13 How.) 115 (1851).

3. Petitioner's argument with respect to the foreign and domestic aspects of national security fails to apprehend an important historical distinction. *Katz* provided no reasonable basis for petitioner to believe that *domestic* national security electronic surveillances were not subject to the warrant requirement. As used in *Katz,* and as explicated by this Court in other cases, the exception for national security was limited to *foreign intelligence* surveillances.

In *Alderman v. United States,* 394 U.S. 165 (1969), the Court authorized trial judges to assess the legality of national security claims. That the Court believed some national security taps to be unconstitutional is made clear by its rejection of the Government's plea for non-disclosure of the logs:

> It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to *national security* or third-party interests. But this is a choice the Government concededly

> faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant. (emphasis supplied).

*Id.* at 184.

*Alderman* made it clear that courts were competent to review claims of national security. Indeed, to the extent that members of the Court were concerned with unlimited judicial review of "national security" matters, they very narrowly restricted the scope of that doctrine.

Justice Harlan limited national security to espionage cases, to those "in which the defendant is charged . . . with spying for a foreign power." 394 U.S. at 198. Justice Fortas characterized "national security material" as a "rigid and limited" category, including only activities "specifically directed to acts of sabotage, espionage, and aggression by or on behalf of foreign states." 394 U.S. at 209.

Justice Stewart, author of the *Katz* opinion, concurred in *Giordano v. United States*, 394 U.S. 310, 313 (1969), and termed the putative exception as one relating to the "gathering of foreign intelligence information." He noted the necessity of protecting "national defense secrets and installations from foreign espionage and sabotage." 394 U.S. at 314. Of course, all of these definitions encompass saboteurs and spies, not domestic political groups.[14]

Thus, as of 1970, the only possible open question related to foreign intelligence surveillance. Petitioner's

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[14]Justices Douglas and Brennan were of the view that there was *no* national security exception under the Fourth Amendment's warrant requirement. *Katz, supra* at 359-60.

reliance on *United States v. Dellinger,* No. 69-Cr.-180 (W.D. Ill. Feb. 20, 1970) and *United States v. O'Neal,* KC-CR-1204 (D.Kan. Sept. 3, 1970) is misplaced. *Dellinger* involved a surveillance that sought *"foreign intelligence information."* J.A. 32. The purpose of the tap in *O'Neal* is not clear, but both *Dellinger* and *O'Neal* relied on *United States v. Clay,* 430 F.2d 165 (5th Cir. 1970) which involved foreign intelligence matters, and where the Government *conceded* the illegality of warrantless domestic security taps.[15]

The unconstitutionality of domestic national security surveillance was so clearly established at the beginning of petitioner's tenure as Attorney General that in April, 1969, the Solicitor General, Erwin N. Griswold, advised petitioner that a wiretap of an individual or organization which had no foreign intelligence information and which was not necessary for the protection of national defense secrets and installations from foreign espionage and sabotage was indefensible under Supreme Court rulings:

> It could be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [deleted] or other subversive organizations or any officers or members of such organizations. *I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented* but I believe we would get a broad ruling that all elec-

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[15]Moreover, petitioner promulgated his warrantless "national security" program on May 6, 1969, well before the *O'Neal* and *Dellinger* cases, and there is no evidence that he relied on these decisions in authorizing this surveillance.

> tronic surveillance is unconstitutional if conducted without a warrant. I.J.A. Ct.App. 230. (emphasis added).

A response to this memorandum prompted the Solicitor General to state: "[i]f a domestic organization is engaged in a criminal conspiracy, we can obtain a warrant to authorize eavesdropping under the Crime Control Act, but there is no procedure under the Act to get a warrant to eavesdrop for foreign intelligence purposes." I.J.A. Ct. App. 238-239.

A statutorily prescribed manner of seeking judicial clarification of the constitutional issue regarding the validity of the warrantless electronic surveillance was also available. See 18 U.S.C. § 2518(7) (emergency judicial approval available after tap installed). Proceeding under that provision would have protected against constitutional abuses while affording petitioner sufficient latitude in decision-making; thus, it is simply fatuous to suggest that he was forced into a "gambling game in which crushing personal liability becomes a cost of making erroneous guesses . . . " Brief, 33.[16]

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[16]It is also noteworthy that from 1940 to 1958 various Attorneys General sought Congressional legislation to authorize electronic surveillance. Despite repeated protestations that they were unable to carry on these surveillances in the absence of specific legislative authorization, Congress consistently refused to pass legislation conferring this power, even in national security cases. See Theoharris & Meyer, *The National Security Justification for Electronic Eavesdropping, An Elusive Exception*, 14 Wayne St. L. Rev. 749 (1968).

Nor could petitioner have reasonably relied on the fact that some Presidents had authorized wiretapping since all such activity took place in the pre-*Katz* era where non-trespassory surveillances were not unconstitutional.

### B. The Record In This Case Demonstrates That There Was No Legitimate National Security Predicate For The Electronic Surveillance.

The district court did not decide whether the surveillance at issue was in fact based on proper national security considerations. Of course, the failure of petitioner to demonstrate a legitimate national security basis for the surveillances would establish liability under § 2520 and the Fourth Amendment. See *Keith, supra,* 407 U.S., at 339-341 (White, J., concurring); *Zweibon v. Mitchell,* 516 F.2d at 671, n.274; at 681 (McGowan, J., concurring).

The record in the case demonstrates that the electronic surveillance was not properly conducted for purposes of national security; further, even assuming that security interests were involved, there is an open factual question as to the primary purpose of the surveillance. Thus, even if the right violated was not clearly established, the case must be remanded for consideration of these issues.

1. Petitioner assumes that an Attorney General's assertion of national security precludes judicial review. But, the principle that purported national security surveillances are subject to the full scope of judicial review under the Fourth Amendment was critical to the holding in *Keith.* In requiring prior judicial authorization, the Court emphatically rejected the Government's assertion that national security factors are not capable of competent judicial determination:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. . . . If the threat is too subtle or complex for our senior law enforcement officials to convey its significance to a court, one

> may question whether there is probable cause for surveillance. *Id.* at 320.

In other contexts the Court has refused to allow alleged national security interests to limit judicial scrutiny of legislative or executive actions. See *United States v. Robel, supra* at 263-64 (1967) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."); *Knauff v. Shaughnessy,* 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("Security is like liberty in that many are the crimes committed in its name").

A Select Committee of the United States Senate addressed the abuses of national security electronic surveillances:

> The imprecision and manipulation of labels such as 'national security,' 'subversive activities,' and 'foreign intelligence' have led to unjustified use of these techniques . . . The very intrusiveness of these techniques demands the utmost circumspection in their use. But with vague or non-existent standards to guide them, and with labels such as 'national security' and 'foreign intelligence' to shield them, executive branch officials have been all too willing to unleash these techniques against American citizens with little or no legitimate justification.

"Intelligence Activities and the Rights of Americans," *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities,* Report No. 94-755, United States Senate, at pp. 183-184; 209.

In fact, the Committee found that:

> The legal limitations on domestic wiretapping apparently did not concern officials in the White House or

> Attorney Generals who requested the FBI to do their bidding. In some instances, they specifically requested the FBI to institute wiretaps on American citizens with no substantial national security predicate for doing so. *Id.* at 162.

In this case, given petitioner's arbitrary definition and broad application of national security, "the danger of abuse in acting to protect that interest becomes apparent." *Keith, supra* at 314.[17]

2. Here, the Court need not reach the constitutional issue since petitioner, on this record, has failed to demonstrate that the surveillance comes within the *statutory* definition of national security in 18 U.S.C. § 2511(3). In defending this surveillance, the Attorney General submitted an affidavit claiming that the "electronic surveillance was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the national security *as set forth in 18 U.S.C. 2511(3).*" (emphasis added). J.A. 23. Under § 2511(3), the surveillance could not properly be based on national security unless it was demonstrated that it was "necessary to protect the United States against the overthrow of the Government by force or unlawful means or against any other clear and present danger to the structure or existence of the Government."

Initially, there was no plan here to "overthrow" the Government. And it is not at all clear that the plans to disrupt utility services to some federal buildings or to

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[17]It is also worth recalling that petitioner has previously invoked "national security" as part of a criminal scheme. *United States v. Haldeman*, 559 F.2d 31, 54 n.15 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (faked national security claim to foil investigation of Watergate cover-up).

kidnap Dr. Kissinger, as serious crimes as these may be, constituted a danger to the "structure or existence" of government. Moreover, whatever threat existed was plainly not a "clear and present danger." Significantly, neither the affidavit submitted by the Attorney General concerning this tap, J.A. 23, nor the authorization itself, I.J.A. Ct.App. 133, which was submitted by Director Hoover for petitioner's approval, made any assertion that there was a clear and present danger to the structure or existence of the government. Thus, assuming *Harlow* should be applied in a manner which precludes consideration of the fruits of discovery, petitioner fails to establish his claim. See *Keith, supra* at 335-344 (White, J., concurring). Petitioner's definition of national security, including his assertion that he had "no other guidelines" than his own beliefs as to the scope of national security matters, II.J.A. Ct.App. 96, utterly fails to satisfy the specific language of Tile III.

If the entire record of this case is considered, there is an issue of fact as to whether the plans presented a clear or present danger to the existence of Government.[18] A high FBI official stated that there were "no concrete plans" and that the "kidnap plot" was "rhetorical." I.J.A. Ct.App. 142-43. The Government was kept fully informed of the details of the plans, through the use of a well-placed informant and, since the alleged criminal acts were projected for a sufficiently lengthy time in the fu-

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[18]In *Brandenburg v. Ohio,* 395 U.S. 444 (1969), this Court ruled that a state may "not forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to initiate or produce such action." *Id.* at 447 (emphasis added).

ture, no present danger existed. Accordingly, the Government had sufficient recourse, including indictment and arrest, to protect itself and to prevent any serious overt acts.

3. The trial court did not expressly decide whether national security, criminal investigation or political intelligence was the primary purpose of the surveillance. We do not discuss all of the facts that bear on this issue; nor does the procedural setting of this case call for a full analysis of the legal standards to be applied. See, e.g., *Halperin v. Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979). Rather, the following is set forth solely to demonstrate the existence of a disputed issue of fact.

In September, 1970, the Philadelphia office of the FBI was assigned primary responsibility for the criminal investigation of ECCSL. On October 12, 1970, the Philadelphia office requested the Director FBI and Department of Justice to evaluate its Report with reference to the "timing of legal moves." I.J.A. Ct.App. 156. On October 13, 1970, the Report was transmitted by the FBI to the Criminal Division of the Department of Justice with a request from the FBI "for a prosecutive opinion." The Philadelphia office advised, as early as October 12, 1970, that the FBI should consider electronic surveillance of the subjects of the criminal investigation. *Id.,* at 157.

On November 13, 1970, the case attorney from the General Crimes Section of the Criminal Division recommended that the FBI conduct "a full scale investigation using appropriate investigative methods, including court-approved wiretaps." *Id.,* at 193. Thus, at the same time that warrantless wiretapping had been authorized by the Attorney General on grounds that "it would be a prac-

tical impossibility to submit to the Court all of the facts, circumstances, and other considerations upon which [the] authorization was based," J.A. 23, the attorney from the Department of Justice who was charged with evaluating, and later presenting the case to the grand jury for indictment, had concluded that electronic surveillance of criminal activity could and should be used pursuant to *court* authorization under Title III.

By November 19, 1970, the Criminal Division had reached a decision to prosecute for the alleged conspiracy. I.J.A. Ct.App. 202. On November 24, 1970, at a conference between FBI and Department of Justice personnel, the FBI maintained "that it was imperative to bring the case to a prosecutive point as soon as practicable . . ." *Id.*, at 200. On November 30, 1970, plans were made to obtain indictments on December 16, 1970. *Id.*, at 203.

The surveillance was started on November 24, 1970 (five days *after* the decision to prosecute) and, with a thirty day extension approved by petitioner on December 7, 1970, was kept in operation through January 6, 1971. *Id.*, at 213.

On November 27, 1970, FBI Director Hoover, in testimony before a Senate Committee, disclosed the fact that the FBI was investigating the ECCSL with respect to the alleged kidnapping plans. This testimony was widely reported, see, e.g. *New York Times,* Nov. 28, 1970, p.1, and sparked a national debate on the charges. Thus, as of this date, the FBI had fully monitored these plans and had

disclosed to the alleged conspirators that the government had full knowledge of their activities.[19]

There is, in the documents in this case, a remarkable lack of emphasis on so-called national security matters. Furtherance of the criminal investigation and an attempt to gain information concerning the political activities of William Davidon and his associates emerge as the overriding interests of the Department of Justice.[20]

In addition to gathering information to support a criminal investigation, the surveillance was used to obtain information regarding Davidon's legitimate dissident political activity. For example, the re-authorization for this surveillance, signed by petitioner on December 7, 1970, was primarily concerned with the criminal investigation and Davidon's political activity. FBI Director Hoover requested an extension of the tap based on the assertion that it had produced "highly significant" information that had been overheard. Yet the record shows that the initial surveillance produced nothing of value with regard to national security. It did reveal plans of Davidon and others to hold a press conference concerning Hoover's Congressional testimony. *Id.*, 212-213.

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[19]Indictments were eventually returned in January, 1971. The defendants were not convicted of any charges relating to kidnapping and destruction of heating tunnels. See, *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1972).

[20]In *United States v. Ahmad*, 347 F.Supp. 912, 936 (M.D. Pa. 1972) at a hearing on this very surveillance, the Government stated that a purpose of the surveillance was to further their criminal investigation.

### C. The Failure To Minimize The Overhearings To National Security Matters Rendered The Surveillances Unreasonable Under The Fourth Amendment.

The district court did not address an additional claim made by respondent: whether petitioner violated the Fourth Amendment's well established reasonableness requirement by authorizing surveillances in which there was absolutely no attempt made to minimize overhearings of non-national security matters.

In *Berger v. New York*, 388 U.S. 41, 59-60 (1967), the Court held that the Fourth Amendment requires that an electronic surveillance be aimed at specific communications relevant to the investigation rather than "a roving commission to 'seize' any and all conversations." Thus, the surveillance must be minimized to avoid interception of non-pertinent conversations, particularly of persons unrelated to the investigation. *Keith* confirmed the principle that some degree of minimization would be necessary in the national security area, even if the standards applied would be different than those applicable to criminal investigations. Such standards must be "reasonable both in relation to the legitimate need[s] of Government . . . and the protected rights of our citizens." *Keith, supra* at 323. See also, *Scott v. United States*, 436 U.S. 128 (1978).[21]

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[21] *Katz v. United States, supra,* did not question the reasonableness requirement with respect to national security wiretaps. It therefore was clearly established after *Katz* that executive branch officers who conducted national security wiretaps were required to observe the reasonableness requirement of the Fourth Amendment.

In this case, in the context of an investigation of a group that "fervently dispute(d)" the government's policies, *cf. Keith, supra* at 313, 314, as a matter of policy, there was absolutely no minimization of the overhearings. II.J.A. Ct.App. 88-90. Respondent's protected conversations were overheard and recorded without any regard as to whether they may have been related to the alleged security purposes of the surveillance. *Id.* at 215-222. This disregard of the reasonableness requirement of the Fourth Amendment violated principles that were clearly established in 1970.

### D. Respondent Established A Claim For Damages Under Title III.

Petitioner also violated statutory law by failing to secure a warrant under Title III.[22] The applicability of Title III to this surveillance hinges on Section 2511(3). That provision enumerates five national security situations in which surveillance would not be subject to the procedures and remedies of Title III, *if* the President in fact had the Constitutional power to conduct such surveillances without a judicial warrant.

In *Keith*, this Court stated:

> "Section 2511(3) certainly confers no power, as the language is wholly inappropriate for that purpose. It merely provides that the act shall not be interpreted to limit or disturb such power as the President may

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[22]This issue, too, was not resolved below and it should be remanded. Accordingly, the brief argument presented in this section is made solely to show the basis of respondent's statutory claim.

> have under the Constitution. In short, Congress simply left Presidential powers where it found them."

*Id.* at 303.[23]

As stated by Senator Hart in Senate discussion of § 2511(3) (at 114 Cong. Rec., 308):

> As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by Title III.

In *Zweibon I*, 516 F.2d 594, 659-670, the court held that a warrantless foreign intelligence electronic surveillance is subject to the damage remedies of 18 U.S.C. § 2520. *Zweibon* concluded that § 2511(3) protected the President's authority to conduct national security electronic surveillance where he had that power, but at the same time to make the procedures and remedies of Title III applicable to all other wiretapping, including that done in the name of national security where a warrant *is* required. *Id.* at 656-66. ". . . *the procedures and remedies . . . were to completely occupy the wiretapping field.*" *Id.* (Emphasis in the original.)

Furthermore, petitioner cannot defeat liability on the statutory claim on the theory of a good faith defense. At the time of the surveillance, 18 U.S.C. § 2520 provided:

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[23]The subject matter of "national security" is not exempt from the Act's coverage. § 2516(a) includes those offenses that fall within the national security category. Senate Report No. 1097, 90th Congress, 2d Sess. 97 (1968).

> "A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter [governing emergency powers] shall constitute a complete defense to any civil or criminal action brought under this chapter."[24]

In its requirement of reliance on a specific court order or the emergency provisions, the statutory standard of defense is a significantly narrower one than that afforded by the common law. The adoption of the language of § 2520 in the face of an existing common law standard must be seen as a pre-emption of that standard in cases involving violations of the statute. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).[25]

## III. PETITIONER IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR WARRANTLESS NATIONAL SECURITY SURVEILLANCES.

Petitioner's claim that he is entitled to absolute immunity for all actions taken "to protect the national security" is meritless. It fails on both statutory and constitutional grounds and should be emphatically rejected by this Court.

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[24] § 2520 was amended, effective, February 1, 1971.

[25] We recognize that four of the eight members of the court in *Zweibon I* held that a common law "good faith" defense is available under § 2520. However, the plurality opinion, was written prior to the *Albermarle* decision and was concerned chiefly with the scope of foreign intelligence wiretapping. *Zweibon III*, 606 F.2d 1172, denied retroactive effect to the ruling in *Zweibon I* with respect to Title III liability. However, this ruling again focused on foreign security issues and was further predicated on the assumption that a remedy was available directly under the Constitution. *Id.* at 1182. If relevant, the retroactivity issue should be remanded to afford the parties opportunity to litigate this issue.

1. Initially, it is important to recognize a fact that is ignored by petitioner: Congress has eliminated any possible claim that the Attorney General may have to absolute immunity for the particular function at issue in this case. Under Title III, there can be no question but that the Attorney General, like every other person, is liable in damages for illegal wiretapping. 18 U.S.C. § 2520. The only defense for these officials is that set forth in § 2520—reliance on a court order or legislative authorization.[26] Furthermore, Congressional *repeal* of § 2511(3) (Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797), which was petitioner's sole defense to the statutory damage claim, conclusively establishes that the Attorney General is now liable under Title III for warrantless national security wiretapping.

This fact is dispositive not only of any claim for absolute immunity from statutory damages, but more important, it forecloses the claim to absolute immunity on the constitutional cause of action. Since the Attorney General would be subject to suit and damages under the statute, any purported policy reasons for providing absolute immunity from suit on constitutional grounds are rendered irrelevant. The facts and the legal issues in both causes of action would be virtually identical and no legiti-

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[26]In the district court, petitioner properly conceded that Title III waives any absolute immunity (Defendants' Response to Plaintiff's Cross-Motion For Summary Judgment, at 50, n.50). Congress clearly has the power to define and limit immunities. See *Albermarle Paper Co. v. Moody, supra; Campiti v. Walonis*, 611 F.2d 387, 394 (1st Cir. 1979).

mate purpose could be served by granting immunity on one theory, when it is unavailable on the other.[27]

2. Even assuming that Congress had remained silent on this issue, petitioner's broad assertion that all decisions taken to protect the nation from threats "such as violence, terrorism, subversion or espionage" (Brief, 36) require a complete shield from liability cannot be supported, even by the dictum in *Harlow, supra* at 812. *Harlow* makes clear that a government official seeking the extraordinary protection of absolute immunity must (1) "show that the responsibilities of his office embraced a function so sensitive as to require a total shield of liability" and (2) "demonstrate that he was discharging the protected function when performing the act for which liability is asserted." *Harlow,* 457 U.S. at 814.[28]

*Harlow* rejected "undifferentiated extension" of absolute immunity to Presidential aides because it was inconsistent with the "functional" analysis required by prior opinions. This Court certainly did not suggest that absolute immunity could, in one breath, be conferred on all decisions in the national security "area," but simply that such immunity might be necessary to protect the unhesitating performance of some "special functions" vital to

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[27]Unlike *Nixon v. Fitzgerald, supra,* there is no claim here that absolute immunity is constitutionally required for the Attorney General; rather, petitioner relies on a range of policy reasons.

[28]Again, the threshold issue, not yet decided, is whether petitioner was "discharging any national security functions. The only exception which has been made to this rule was for the President, whose "unique" and "singular" constitutional role was repeatedly stressed by the Court. *Nixon v. Fitzgerald, supra* at 751-753.

the national interest within that area. In a particular case in the future, this Court may hold that there are some functions related to national security for which officials require absolute immunity, a question that obviously need not be reached, but to prevail in this case petitioner must show that the specific decisions made here were "so sensitive as to require a total shield from liability." *Id.*

The present case, of course, lends itself to precise analysis. The conduct in question is petitioner's decision to authorize electronic surveillance of telephone conversations without seeking prior court approval and to forego any minimization of interceptions. The proper question presented is whether these specific decisions were functions requiring absolute immunity.

It is readily seen that these specific functions are not among those as to which executive officials enjoy absolute discretion. To the contrary, this Court has ruled that the decision to employ electronic surveillance in the domestic security area must be made subject to judicial approval. *Keith, supra* at 316-317. In *Keith,* this Court considered interests identical to those at stake in this litigation, including the Government's asserted need to be completely shielded from judicial review in the domestic security area, and concluded that:

> The Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. *Id.* at 321.

Long before *Keith,* this Court had made it clear that the executive branch may not dispense with the requirements of the Constitution by asserting that an action is required by the national security. See p. 29, *supra.* Historical-

ly, the Court has also resisted the pressure of such arguments in actions for damages. *Little v. Barreme,* 2 Cranch 170 (1804); *Mitchell v. Harmony, supra.*

Petitioner's request for absolute immunity here is in fact nothing other than an attempt to reargue *Keith.* Most fundamentally, it conflicts with *Keith* because the specific function involved—national security wiretapping —is in all circumstances subject to the Constitution's requirement of prior judicial approval. This is an area "in which the public interest is demonstrably on the side of encouraging less 'vigor' and more 'caution' on the part of decisionmakers," *Nixon v. Fitzgerald, supra,* 102 S.Ct. 2722-23 (White, J., dissenting). Application of the absolute immunity doctrine would preclude any judicial review and thus is incompatible with the overriding constitutional mandate.

Moreover, petitioner seriously overstates the issue when he poses the specter of a public official frozen into inaction by the fear of personal damages liability in the face of a need to act promptly and decisively to protect the national security. Putting aside the substantial protection afforded by the qualified immunity standard, petitioner could have acted promptly by immediately seeking a warrant for the electronic surveillance or he could have proceeded under the provisions of § 2518(7). The issue here was not between action and inaction, but only between action pursuant to constitutional and statutory procedures and action which violated respondent's constitutional rights. Petitioner's only justification for his failure to seek a warrant in this case was that the matter at hand was too complex to present to a judge. II.J.A. Ct.App.

132. This idea was explicitly rejected by this Court. *Keith, supra* at 320-21.[29]

Finally, to the extent petitioner moves from a specific functional analysis, his failure to define "national security" in anything other than tautological terms (II.J.A. Ct. App. 96) is convincing evidence of the undifferentiated nature of his claims. To grant the Attorney General absolute immunity for any and all acts taken to protect national security would be to invite claims covering a vast array of governmental operations, precisely the sort of abuse *Keith* sought to prevent.[30]

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[29]Similarly, petitioner's failure to order minimization of overheard conversations does not qualify as such a sensitive function. While the scope of conversations considered pertinent may be broader than in a conventional criminal investigation, petitioner was clearly under an obligation to develop some standards "compatiable with the Fourth Amendment. . . reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." *Keith, supra* at 322-323. In doing so, he would be exercising essentially an ordinary police function (although perhaps with a different vocabulary due to the subject matter of the investigation) that is outside of the limited absolute immunity for prosecutors for the initiation and presentation of criminal cases. See *Imbler v. Pachtman, supra*. No national security interest could justify the refusal to minimize the overhearings of non-national security, constitutionally protected conversations.

[30]Much of petitioner's argument on absolute immunity revisits earlier submissions by the Government which this Court has rejected. Petitioner would rely on the "many personal, psychological and ethical constraints that animate the vast majority of our public officers." This misses the point. Damage actions are required not to affect the actions of the majority of officials, but because of the minority who abuse their positions and violate the constitutional rights of citizens. In this respect the law recognizes the truth of Lord Acton's oft-cited warning that "Power corrupts and absolute power corrupts

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3. Absolute immunity is inappropriate in this case for the further reason that petitioner is unable to meet the heavy burden of showing why qualified immunity does not afford sufficient protection to the Attorney General. This Court has held that even high-ranking officials such as cabinet officers, *Butz v. Economou, supra,* and White House assistants, *Harlow v. Fitzgerald, supra,* are adequately protected by qualified immunity. Moreover, the Court has recognized that absolute immunity may work the greatest mischief when conferred upon high-ranking officials:

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. *Butz v. Economou, supra* at 505-560.[31]

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absolutely." The recent history of constitutional violations on the part of certain governmental agencies has done little to diminish the force of this observation.

Given the decision in *City of Los Angeles v. Lyons,* — U.S. —, 103 S.Ct. 1660 (1983), for the government to argue that injunctive actions are an effective means of judicial review of misconduct of the sort alleged in this case, it would have to contemplate a more oppressive future regime of electronic surveillance than occurred during petitioner's tenure.

[31]Petitioner suggests that an official may be hamstrung in his ability to litigate because he may have relied on national

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To protect the rights of citizens as well as to allow public officials an appropriate degree of flexibility in interpreting and enforcing the law, the Court has developed the doctrine of qualified immunity which provides substantial protection to public officials. *Davis v. Scherer, supra.* Petitioner gives no reasons why the Attorney General would not always find such protection as he deserves from the objective standard of the qualified immunity defense, and in particular the "extraordinary circumstances" excuse for neglect of clearly established rights.

Where a court can determine that at the time an official violated the plaintiff's constitutional rights the law was clearly established, "he should be made to hesitate . . ." *Harlow, supra* at 819. Petitioner's brief reveals that the Government still does not appreciate this point. Petitioner asserts, "When the Attorney General is called upon to take action to protect the security of the nation, he should think only of the national good and not about his pocketbook." Brief, 48. This conclusion betrays a continuing failure to understand that any public official, particularly the Attorney General, has a constitutional obligation to weigh not only the "national good," but also the risk of injury to the rights of individuals.

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security information he cannot disclose to the court. But this privilege most often prejudices a plaintiff who may thereby be unable to litigate his claim. See *United States v. Reynolds,* 345 U.S. 1 (1953); *Halkin v. Helms,* 690 F.2d 977 (D.C. Cir. 1982). Absolute immunity for the Attorney General in all cases related to national security is not required to avoid this problem.

## CONCLUSION

The Judgment of the Court of Appeals should be affirmed and the case remanded to the District Court.

Respectfully submitted,

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No. 84-335

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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JOHN N. MITCHELL, PETITIONER

*v.*

KEITH FORSYTH

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

---

### I.

Respondent argues that petitioner should not be permitted to take an immediate appeal from the trial court's ruling that petitioner had violated a "clearly established" constitutional right and is therefore not entitled to qualified immunity.[1]

(a) Respondent says (Br. 10-11) that a claim of qualified immunity—unlike a claim of absolute immunity—is related to the merits in the sense that it requires an examination of the status of the constitutional right in question. But from this undeniably correct premise respondent draws an erroneous conclusion: that a ruling rejecting a qualified immunity defense cannot meet the

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[1] An additional case has been decided on this issue since our principal brief was filed. In *Powers* v. *Lightner*, No. 84-2312 (Jan. 16, 1985) (per Wisdom, J.), the Seventh Circuit followed the reasoning of the Fifth Circuit in holding that a denial of qualified immunity is not immediately appealable. The grounds for the court's decision are fully addressed in our opening and reply briefs.

"separability" prong of the *Cohen* test. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Respondent simply ignores the fact that the qualified immunity ruling in a case such as this is separable precisely in the two ways that, under this Court's cases, matter for purposes of the *Cohen* collateral order doctrine. First, the ruling is separable in the sense that its disposition on appeal "will not 'affect, or * * * be affected by'" any remaining trial proceedings (*Abney* v. *United States*, 431 U.S. 651, 660 (1977)); thus the appellate court can now definitively and finally decide whether the undisputed facts amounted to the violation of a "clearly established" constitutional right.[2] Second, the qualified immunity ruling is separable and collateral in the sense that it involves a rule whose very purpose is to provide a threshold immunity from having to undergo an unmeritorious trial. Pretrial review is therefore a necessary adjunct to the vindication of the rule itself, and is not designed simply to secure an expedited review of the merits. That is why, contrary to respondent's argument (Br. 10), rejection of a qualified immunity claim is not at all like the rejection of an ordinary motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Such a Rule 12(b)(6) motion tests the merits and is in no way designed to confer a threshold immunity from trial; the only purpose of appealing the rejection of such a Rule 12(b)(6) motion would be to secure a pretrial ruling on the merits—the very paradigm of the case to which the final judgment rule applies.

(b) Respondent, in defiance of the law of gravity, seeks to strengthen the foregoing argument by asserting (Br. 13-17) that qualified immunity does not seek to shield officials from trial, only from "liability in damages" (Br. 14); he concludes that, consequently, a ruling

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[2] See *Tubbesing* v. *Arnold*, 742 F.2d 401, 405 (8th Cir. 1984), recognizing the difference between qualified immunity and the merits of a *Bivens* case. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

rejecting this defense is fully and fairly reviewable on appeal from a final judgment. Respondent summarily shunts aside the frequent assertions of this Court to the contrary (see our opening brief at 14-15); his own citations (as we show in the margin [3]) do not in any way qualify the oft-repeated insistence of this Court that qualified immunity is designed to protect not only against ultimate liability but also against the burdens of meritless litigation.

Respondent contends (Br. 15) that only "insubstantial" *Bivens* suits should be quickly terminated and that a case

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[3] Contrary to respondent's contention (Br. 16), this Court's opinions do not contain "explicit statements to the contrary" of the notion that qualified immunity seeks to protect officials from trial as well as liability in undeserving cases. Respondent quotes a sentence from *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 6, stating that qualified immunity protects officials "from liability" for damages. But this sentence does *not* say that qualified immunity provides no additional protection. On the contrary, elsewhere in *Davis* (slip op. 11) the Court observes that "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation * * * only if unjustified lawsuits are quickly terminated."

Respondent cites (Br. 14) *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982), but the sentence to which respondent appears to refer merely states: "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." The Court did not suggest that qualified immunity is "only an affirmative defense against liability" (Resp. Br. 14). *Harlow* said precisely the opposite again and again (see Pet. Br. 14-15).

Respondent also cites (Br. 17) *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n.12 (1975). In *O'Connor* this Court held that the plaintiff in an action for damages under 42 U.S.C. 1983 had been the victim of unconstitutional conduct. The Court remanded for reconsideration of the defendant's qualified immunity claim. The Court stated (422 U.S. at 577 n.12): "Upon remand, the Court of Appeals is to consider only the question whether [the defendant] is to be held liable for monetary damages." This statement in no way supports respondent's view that qualified immunity is not intended to protect against meritless trials. In any event, at the time *O'Connor* was decided, qualified immunity generally did not protect the official from trial, as this Court noted in *Harlow* (457 U.S. at 814, 817) in explaining why it was necessary to adjust that standard.

can never be viewed as "insubstantial" if a district court has denied qualified immunity. See also *Powers* v. *Lightner*, No. 84-2312 (7th Cir. Jan. 16, 1985), slip op. 10; *Kenyatta* v. *Moore*, 744 F.2d 1179, 1184 (5th Cir. 1984). This very case refutes the argument. Respondent's claim is clearly barred by qualified immunity (see Pet. Br. 27-35); yet the district judge has steadfastly adhered to his contrary conclusion in the face of weighty authority directly on the point (see Pet. Br. 30-31), and has, by denying certification under 28 U.S.C. 1292(b), sought to insulate this unsupportable ruling from prompt appellate correction. If the rule of qualified immunity is going to do its job of assuring that officials are not deterred from the exercise of their functions by the fear of harrassing and unjust litigation, expedited appeal of such rulings is essential.[4]

(c) Respondent next argues (Br. 11-12) that qualified immunity claims often turn on disputed factual questions that cannot be resolved without trial, and that it is difficult and burdensome to identify those cases where the facts are not in dispute. This argument rests importantly on the premise (see Resp. Br. 11-12) that a defendant's motives and subjective intent will often be at issue in *Bivens* suits; it simply ignores the fact that, under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the defendant's subjective state of mind is no longer relevant to the question whether the defendant is or is not immune because the constitutional right in question was or was not clearly established.

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[4] Respondent suggests (Br. 16) that an immediate appeal is not needed in this case because the punitive damages claim that was asserted below (see Pet. App. 76a, 33a-34a) has now been formally abandoned. Aside from the fact that this should not affect appealability of the district court's order, we must note that assurances that further proceedings will not prove burdensome to petitioner are far from comforting in light of respondent's insistence (Br. 3-4, 30-34) that petitioner's motives in authorizing the Davidon wiretap still may be challenged below.

Beyond this, the decision of the question whether the defense of qualified immunity should have been upheld as a matter of law is one that will in no way engulf the courts of appeals in the difficult terrain that so frightens respondent. Respondent asks (Br. 12):

> How is a court of appeals to determine in advance of a complete review of the case whether there are disputed facts on the qualified immunity issue?

The answer, of course, is that the wholly familiar rules governing appellate review of summary judgment rulings will be applied. If there is no dispute about the facts material to the immunity issue, the court need only determine whether the law governing the defendant's conduct was clearly established. See *Tubbesing* v. *Arnold*, 742 F.2d 401, 404-405 (8th Cir. 1984). Even where the court of appeals finds that the facts material to the immunity issue are in genuine dispute, the court must determine whether the facts as stated by the plaintiff add up to a violation of "clearly established" constitutional rules. There is nothing unusual or arcane about any of this. Nor is there anything about *Bivens* cases that makes this particularly burdensome or difficult.

Indeed, this is exactly what courts of appeals must do when claims of *absolute* immunity turn on factual issues (as they occasionally do, contrary to respondent's suggestion (Br. 10)).[5] The present case illustrates the point. In its initial decision in this case, the court of appeals held (Pet. App. 111a-113a) that petitioner would be absolutely immune if he authorized the wiretaps in a prosecutorial, rather than an investigative or administrative, capacity; and the court of appeals remanded (*id.* at 116a) for the district court to conduct "any additional inquiry" needed to resolve this factual issue. Since pre-

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[5] Contrary to his argument at page 10 of the brief, respondent elsewhere contends that both the absolute and qualified immunity issues are dependent upon resolution at trial of the same factual issue about petitioner's motives (Br. 3-4; see also *id.* at 40 n.28).

trial appeal of the denial of absolute immunity is not precluded by the possibility that such factual issues may arise in particular cases, the possibility of factual disputes does not justify a blanket prohibition of pretrial appeal where qualified immunity is denied.

(d) Respondent also asserts (Br. 17-19) that allowing appeals of orders denying qualified immunity will have a "crushing" impact on appellate dockets. This argument is unsupported and demonstrably false. As noted in our opening brief (at 17), no federal defendant, to our knowledge, has taken such an appeal in the District of Columbia Circuit in the 26 months since *McSurely* v. *McClellan*, 697 F.2d 309 (1982), allowed such appeals. Nor do we believe that any federal defendant has taken such an appeal in the Eighth Circuit during the 20 months since *Evans* v. *Dillahunty*, 711 F.2d 828 (1983), was handed down. And we have found only one reported Eighth Circuit decision involving a pretrial appeal by a state defendant contesting the denial of qualified immunity. *Tubbesing* v. *Arnold*, 742 F.2d 401 (1984). Based on this record, there is every reason to believe that the number of qualified immunity appeals will be modest.[6] And allowing such appeals will improve over-all judicial

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[6] Respondent refers in this connection (Br. 17 n.9) to the total number of civil rights cases filed in the district courts. This statistic is irrelevant. It includes *all* civil rights cases—whether for damages or nonmonetary relief; whether brought by or against individuals, units of government, or other entities; and whether the claim asserted was statutory or constitutional. The statistic refers to district court filings; it does not reveal how many of these cases were abandoned or settled before trial; nor does it disclose how many were appealed, much less how many were sought to be appealed before trial. See *Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts* 248-249 (1983). Respondent does not cite any other statistical support—or, indeed, any other support—for his assertion that the workload of the courts of appeals will significantly increase if our position on appealability is accepted.

efficiency by helping promptly to terminate meritless and protracted litigation.[7]

## II.

(a) Respondent asserts that in November 1970 it was "clearly established" that warrantless domestic security wiretaps were unconstitutional. Faced with the unwelcome fact that *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), expressly reserved decision on the legality of such warrantless electronic surveillance "in a situation involving the national security," respondent argues (Br. 24; emphasis in original) that "[a]s used in *Katz* and as explicated by this Court in other cases, the exception for national security was limited to *foreign intelligence* surveillances." Nothing in *Katz* supports this exegesis, and in *Keith*, where the Court finally passed on the constitutionality of warrantless *domestic* security wiretaps, the Court specifically noted that it was "address[ing] a question left open by *Katz* * * *" (*United States* v. *United States District Court*, 407 U.S. 297, 309 (1972)). The Court also acknowledged that "electronic surveillance in *internal security matters* without prior judicial approval" had been authorized by "[s]uccessive Presidents for more than one-quarter of a century * * * without guidance from the Congress or a definitive decision of this Court" [8] and that *Keith* "[brought] the issue [to this

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[7] As this Court recognized in *Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977), "[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of [immunity]." See, *e.g.*, *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982) (expediting a qualified immunity appeal and deciding it on the briefs so as not to disrupt the trial schedule).

[8] Respondent contends (Br. 27 n.16) that petitioner could not reasonably have relied on the practice of other Attorneys General prior to *Katz* because, until *Katz* was decided, nontrespassory surveillances were constitutional under *Olmstead* v. *United States*, 277 U.S. 438 (1928). However, there is no reason to believe that all of the warrantless national security surveillances conducted by peti-

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Court] for the first time" (*id.* at 299; emphasis added).[9]

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tioner's predecessors were nontrespassory. Further, it must be remembered that the question of the President's constitutional authority to conduct such surveillances was important even before *Katz* in view of the prohibition on interception and divulgence in 47 U.S.C. (1964 ed.) 605. See, *e.g.*, *United States* v. *Butenko*, 494 F.2d 593, 600-602 (3d Cir.), cert. denied, 419 U.S. 881 (1974). With respect to respondent's related argument (Br. 27 n.16) that petitioner's reliance on prior practice was unreasonable in light of Congress's failure during the 1940's and 1950's to enact legislation specifically dealing with national security wiretaps, see *United States* v. *Butenko*, 494 F.2d at 599-600.

[9] Respondent's inventive reading of *Katz* is not supported, as he contends (Br. 24-25), by either *Alderman* v. *United States*, 394 U.S. 165 (1969), or *Giordano* v. *United States*, 394 U.S. 310 (1969). *Alderman* and *Giordano* concerned the disclosure of illegally intercepted conversations, not the legality of electronic surveillances. Those cases held that the records of conversations overheard by illegal electronic surveillance must be turned over to criminal defendants with standing. In *Alderman*, the Court noted in passing (394 U.S. at 184; emphasis added): "It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to *national security* or third-party interests." This observation did not mean, as respondent deduces (Br. 24), that all or even some warrantless national security wiretaps were illegal. This Court dealt only with the disclosure of illegally intercepted conversations and left it for the lower courts to decide on remand whether the wiretaps at issue were constitutional (394 U.S. at 186). Furthermore, the national security wiretaps in *Alderman* were directed against agents of a foreign power, and the Court has not to this day held that warrants are constitutionally required in such cases.

Nor does respondent's position gain from Justice Stewart's concurrence in *Giordano*, which noted (394 U.S. at 314-315) that the legality of warrantless foreign intelligence wiretaps had been left open in *Katz*. Justice Stewart's reference to foreign intelligence surveillance was natural, since he was discussing *Alderman* and its companion cases, which involved such surveillance. No negative pregnant regarding domestic security surveillances can fairly be read into his discussion.

Even if there were some implication in the *Alderman* and *Giordano* opinions that warrantless domestic security wiretaps were illegal, the standard under *Harlow* is whether the applicable rule of law was "clearly established," not whether the eventual resolution

Respondent simply ignores all of this. His position really suggests that the *Keith* litigation itself was an empty exercise, that the government should never have litigated the case, and that this Court really did not know what it was doing when it stated in *Keith* that the question was before it "for the first time." There is no warrant for such a retroactive rewriting of history.

(b) In our opening brief (at 28-29), we showed that petitioner's conduct in this case was supported by the then-existing lower court authority. Respondent's claim (Br. 26) that these cases did not concern domestic national security threats is incorrect.[10]

Respondent refers (Br. 26-27) to advice petitioner received from Solicitor General Griswold. Much as we may regret it, a Solicitor General's views do not automatically constitute "clearly established" law. In any event, the Solicitor General's memoranda on this subject (see 1 C.A. App. 228, 233) are plainly directed at issues of litigation strategy and tactics, and in no way purport to describe what was and what was not "clearly established" by existing law. As the court of appeals said about these very memoranda in *Zweibon IV*, 720 F.2d at 171, the Solicitor General was merely making "predictions as to future action by the Supreme Court and discuss[ing] strategic considerations for potential litigation." He did

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of the issue could have been predicted based on dicta in individual opinions, nuances of language, or other even less tangible grounds. See *Zweibon* v. *Mitchell (Zweibon IV)*, 720 F.2d 162, 172-173 (D.C. Cir. 1983), cert. denied, No. 83-2005 (Oct. 9, 1984).

[10] As the record below reflects (1 C.A. App. 82), both *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (J.A. 30), and *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 3, 1970) (J.A. 38), involved surveillance of the Black Panther Party, the same organization that was placed under surveillance in *Keith*. See *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1081 (D.C. Cir. 1981). Respondent's truncated quotation from *Dellinger* omits the reference in the same sentence to "information concerning domestic organizations" seeking to subvert the government by force (J.A. 32).

not "purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance." *Ibid.* Other high-ranking Justice Department officials, including the Assistant Attorneys General for the Criminal and Internal Security Divisions, expressed contrary views.[11] As Attorney General, petitioner's obligation was to make a conscientious and prudent judgment about the needs of national security in the context of this uncertain and much-disputed legal environment. To conclude, 15 years later, that his decision violated "clearly established" rules would subvert the very heart and soul of the qualified immunity defense. It would say to our officials: when in doubt always reject the bolder course because the consequence of bold action may be ruinous personal liability. But the very purpose of immunity is to say to our officials that *personal* liability will attach *only* if there is no substantial doubt about the unconstitutionality of the course pursued.

(c) There is no merit in respondent's argument (Br. 28-34) that the wiretaps in this case, which sought information about the threatened plot to damage and cripple important federal facilities in Washington and kidnap Henry Kissinger (then engaged in secret negotiations to end the war in Vietnam), were not related to the national security. The district court in this case has already found

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[11] Numerous intra-departmental memoranda were prepared on the constitutionality of warrantless domestic security wiretaps. Some of those received by petitioner are included at 1 C.A. App. 223-241. Many others were found in an exhaustive search of departmental files conducted after the docketing of the appeal in this case. See Supplemental Response to Plaintiff's Interrogatories to Defendant (Apr. 8, 1983). In the particular memorandum quoted by respondent (Br. 26-27), the Solicitor General questioned whether this Court would sustain the constitutionality of warrantless domestic security wiretaps, but after receiving Assistant Attorney General Yeagley's contrary views (1 C.A. App. 223), the Solicitor General stated that "there is no reason for us to concede that only foreign intelligence surveillance may be constitutionally authorized by the Attorney General" (*id.* at 237).

that the wiretaps were conducted for national security purposes (Pet. App. 59a):

> The Attorney General stated that he approved the wiretaps as part of a national security investigation. The Court has taken defendant Mitchell at his word.

See also *id.* at 65a. Similarly, the district judge in *Burkhart* v. *Saxbe*, 596 F. Supp. 96, 101 (E.D. Pa. 1984) (Pet. App. 150a)) concluded in light of the unique threat posed by the ECCSL's plans that "[w]hatever may be a proper definition of a 'national security' wiretap, and its full contours, * * * the Davidon * * * wiretap[] certainly qualif[ied] as [a] national security wiretap[]."

Respondent provides no grounds for doubting this conclusion. A "clear or present danger to the existence of Government" (Resp. Br. 31) should not have to be shown before a threat can be investigated. Nor is the government precluded from gathering as much information as it can about a plot against the national security before arresting the known conspirators (compare Resp. Br. 31-32). Finally, it makes no difference that these surveillances had the effect of uncovering evidence of crime as well as serving to protect the national security (see Resp. Br. 28-34). The wiretaps were placed in order to detect and prevent the commission of acts threatening to the country's domestic security, and not simply to investigate crimes already committed. "No doubt one of the most effective means of halting subversive activity aimed at the violent disruption of the government is to criminally prosecute those involved." *Burkhart* v. *Saxbe*, 448 F. Supp. 588, 596-597 (E.D. Pa. 1978), rev'd on other grounds *sub nom. Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981), on remand, 596 F. Supp. 96 (E.D. Pa. 1984);[12] see also S. Rep. 1097, 90th Cong., 2d Sess. 94 (1968).

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[12] In those cases in which the purpose of a wiretap is material to the authorizing official's qualified immunity claim, that purpose must be resolved consistently with this Court's focus in *Harlow* on the objective reasonableness of the official's actions. Thus, where,

(d) Respondent is unable to establish (Br. 35-36) that the Davidon surveillance offended clearly established minimization standards. Respondent does not cite a single case decided prior to *Keith* that addressed the minimization standards applicable to national security wiretaps. In *Berger* v. *New York*, 388 U.S. 41, 59-60 (1967), on which respondent relies (Br. 35), the Court discussed the minimization issue in the context of a wiretap conducted for criminal investigative purposes,[13] and nothing in the Court's opinion implied that the same minimization standards would apply in national security cases. On the contrary, five years later in *Keith* the Court clearly suggested that the same minimization requirements need not apply (see 407 U.S. at 322):

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as here, "the record discloses a rational national security concern, this should suffice, even though there may have been other possible reasons or motives." *Burkhart* v. *Saxbe*, 596 F. Supp. at 100 (Pet. App. 150a); accord *Smith* v. *Nixon*, 582 F. Supp. 709, 714-715 (D.D.C. 1984) (on appeal). Any other conclusion would destroy the very protection *Harlow* sought to give.

Further, respondent's claim that petitioner was improperly motivated in this case is based on selective citations to internal government memoranda that respondent does not even contend petitioner received. For example, respondent states (Br. 31) that "[a] high FBI official stated that there were 'no concrete plans' and that the 'kidnap plot' was 'rhetorical'" (*ibid.*). This is based on an internal FBI memorandum (1 C.A. App. 142-143) that noted that there were no concrete plans regarding the kidnapping (as distinguished from ECCSL's other objectives) and opined that while the kidnap plot may have been rhetoric, "the possibility exists that these individuals have the dedication of purpose to attempt to pull it off." Similarly, respondent questions (Br. 32-33) petitioner's judgment that it would be inappropriate to seek judicial authorization for the wiretap by citing an isolated reference by a Criminal Division staff attorney to his section chief that court-approved wiretaps might be used.

[13] It is doubtful that *Berger* clearly established generally applicable minimization standards for criminal investigative surveillances (see *Scott* v. *United States*, 436 U.S. 128, 139-140 (1978)), much less for national security cases.

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

In light of *Keith*, the lower courts, with the lonely exception of the district court in this case, have held that at least prior to 1972 there was no clearly established obligation to minimize the scope of national security surveillances. *Zweibon IV*, 720 F.2d at 170; *Chagnon* v. *Bell*, 642 F.2d 1248, 1262-1263 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981); *Sinclair* v. *Kleindienst*, 645 F.2d at 1082, 1085; *Burkhart* v. *Saxbe*, 596 F. Supp. at 101-102 (J.A. 151a-154a).[14]

(e) Respondent finally contends (Br. 36-38) that the wiretaps in this case violated clearly established statutory standards contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* This argument ignores the holding in *Keith* that the provision of Title III dealing with national security surveillance, 18 U.S.C. (1976 ed.) 2511(3), simply "left presidential powers where it found them" (407 U.S. at 303). The Court elaborated (*id.* at 306; footnote omitted):

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[14] Contrary to respondent's suggestion (Br. 35), petitioner promulgated internal minimization requirements even though not required to do so by law. *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1082, 1085 (D.C. Cir. 1981).

> [I]t would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear [by 2511(3)] that the Act simply did not legislate with respect to national security surveillances.

See *United States* v. *Butenko*, 494 F.2d 593, 600 n.25 (3d Cir.), cert. denied, 419 U.S. 881 (1974) ("[T]he only limitations on the President's authority to engage in * * * [national security] electronic surveillance are those set forth in the Constitution.").

## III.

(a) Respondent offers two principal arguments why an Attorney General should not be absolutely immune from suit for damages when he acts to protect national security. Respondent contends (Br. 44-45) that absolute immunity is unnecessary because qualified immunity pro-

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[15] In its initial decision in the *Zweibon* case, the District of Columbia Circuit concluded that *Keith* "offers only ambiguous guidance" on the statutory question and held that Congress must have intended "the applicability of the statute [to be] contingent upon further judicial pronouncements * * *." *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594, 660, 666 (D.C. Cir. 1975) (en banc, plurality opinion) (emphasis omitted), cert. denied, 425 U.S. 944 (1976). The court concluded, in part for policy reasons, that Title III generally should apply to national security surveillances.

In relying on the *Zweibon I* decision, respondent neglects to mention the court of appeals' later decision in that case, holding that "[t]he plurality's application of Title III to unconstitutional national security surveillance represented the sort of sharp break in the law which should be restricted to prospective effect." *Zweibon* v. *Mitchell* (*Zweibon III*), 606 F.2d 1172, 1182 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981).

vides sufficient protection. We already addressed this argument at length in our opening brief (at 36-39). We merely reiterate here that the identical argument can always be made when absolute immunity is sought. Why isn't qualified immunity sufficient for judges, prosecutors, witnesses, jurors, and the President? Qualified immunity is supposed to fail only where clearly established legal standards were violated. What justification can there be for holding an officer who violated such standards immune?

The answer is that qualified immunity—even after *Harlow* and even if our position on appealability is adopted—still exposes a *Bivens* defendant to substantial risks and burdens. The defendant must persuade a district judge, many years later, that he did not violate clearly established law; he must bear the burden of appeal if, as in this case, a district court mistakenly and stubbornly denies a valid qualified immunity claim; and if there are genuine factual disputes relating to his immunity claim, he may have to undergo discovery and trial. As this case shows, these can be formidable burdens, and they may interfere with "the unhesitating performance of functions vital to the national interest." *Harlow* v. *Fitzgerald*, 457 U.S. at 812. A defendant official may be distracted from urgent public business by proceedings in a pending suit for damages, and in making decisions of great public importance an official may hesitate to do what he feels is necessary and proper for fear that he might be sued personally in damages. In short, respondent's broad argument proves too much, for it suggests that absolute immunity is never appropriate. This Court has of course rejected that proposition.

The fundamental question is whether we want a particular public official performing a particular function to discharge his public responsibilities without the distractions and hesitations that the fear of personal damages litigation may occasion. As this Court made clear in *Harlow* and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982),

some functions of government, assessed in light of our constitutional heritage and structure, are so fundamentally important to the national well-being that the public interest demands their "unhesitating performance" (*Harlow*, 457 U.S. at 812), which only absolute immunity can assure. As respondent's own brief reflects (Br. 19-34), the core of this case is the Attorney General's judgment that the national security was threatened and that a particular response was called for, one that he deemed to be within the President's Article II powers. This judgment was made in the performance of functions that, under our constitutional scheme, are central to the office of Attorney General and to the office of President. It is critically important that the performance of those functions be unclouded by concerns about personal liability.

Respondent also argues (Br. 40-43) that, while absolute immunity might be appropriate with respect to some national security decisions (Br. 41), it is unnecessary in the narrow circumstances of this case. In respondent's view, this Court should not consider the general question whether the Attorney General needs absolute immunity when he acts to protect national security. Instead, respondent suggests, the Court should focus narrowly on the warrantless domestic security wiretaps carried out here, and ask whether the national security would have been impaired had petitioner sought warrants before conducting these wiretaps.[16]

The difficulty with this argument is that the point of absolute immunity in the area of national security deci-

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[16] Respondent incorrectly asserts (Br. 42) that the only reason petitioner did not seek a warrant was his generalized view that national security matters were too complex for a judge. In fact, petitioner testified at his deposition that he did not believe that Dr. Kissinger's negotiations should be disclosed to a court (2 C.A. App. 140). More basically, petitioner explained that seeking judicial approval under Title III (or utilizing its emergency provision, 18 U.S.C. 2518(7)) would have been inconsistent with his view that national security wiretaps were the responsibility of the Executive not the Judicial Branch (2 C.A. App. 141).

sions—to eliminate the prospect of burdensome and unmeritorious litigation as definitively as possible—would be destroyed if it were subject to unspecified exceptions, to be applied retroactively by the courts in the light of their ex post facto judgment that the national security could have been safeguarded even if the defendant had not acted or had used different means. Respondent's argument therefore does nothing but repose the fundamental question: do we want the Attorney General to deal with vital national security concerns with the ever-present thought that he is subject to suits for personal damages whenever he does not pursue the most cautious course, one that by hindsight may be viewed as sufficient to meet the threat? We think the answer is clear. Our legal and political system provides alternative checks and restraints to discourage and punish blatant violations of constitutional rights. In this special and sensitive context the threat of personal damages liability is an additional deterrent that would exact too high a price.[17]

(b) Respondent's remaining arguments on absolute immunity are insubstantial. Respondent argues (Br. 39-40) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, abrogated any immunity enjoyed by the Attorney General with respect to electronic surveillance. As previously noted, however, in *Keith* this Court reviewed the language and legislative history of Title III and concluded (407 U.S. at 306) that Congress "simply did not legislate with respect to na-

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[17] In our opening brief (at 39 & n.27) we noted that an Attorney General may have great difficulty in defending against a damages suit concerning national security matters because of his inability to obtain or disclose confidential information. Respondent suggests (Br. 44-45 n.31) that the privilege for national security information "most often prejudices a plaintiff." This assertion is unsupported and, in any event, is little comfort to those defendants who are seriously prejudiced. See also *Ellsberg* v. *Mitchell*, 709 F.2d 51, 64-66 (D.C. Cir. 1983) (damages action should not be dismissed where classified information is needed only to make out a qualified immunity defense).

tional security surveillances." Since Title III did not regulate national security surveillances, it did not affect the Attorney General's immunity in that sphere.[18]

Respondent maintains (Br. 42) that "[p]etitioner's request for absolute immunity here is in fact nothing other than an attempt to reargue *Keith*." But *Keith* had nothing to do with personal damages liability or immunity from such liability. The government is not in any way asking this Court to reexamine *Keith's* conclusion that the Constitution requires warrants for domestic security wiretaps. (It is in full compliance with that ruling and has no intention to depart from it.) The question here is sharply different: whether Attorneys General making decisions in the context of national security should in the future be constrained by the knowledge that they are continuously subject to personal liability litigation with

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[18] Contrary to respondent's contention (Br. 39 n.26), petitioner did not concede below that Title III abrogated absolute immunity (Resp. Br. 39 n.26). Instead, the referenced district court filing noted that Title III would eliminate petitioner's absolute immunity only "[i]n the event the Court holds Title III applicable to national security surveillances, contrary to the authorities urged by defendants * * *" (Defendants' Response to Plaintiff's Cross Motion for Summary Judgment at 50 n.50 (July 6, 1976)). As already discussed, however, there is no indication that Congress intended to make the Attorney General liable for national security surveillances when it enacted Title III. Compare *Nixon* v. *Fitzgerald*, 457 U.S. at 748-749 & n.27 (Court will not assume that Congress intended to waive immunity grounded in constitutional responsibilities in the absence of "explicit affirmative action by Congress.").

It is true that the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*, repealed the provision of Title III, 18 U.S.C. (1976 ed.) 2511(3), that disclaimed any intent to regulate national security wiretaps. The effect of this repeal was to make domestic national security wiretaps subject to Title III's requirements. However, respondent is clearly wrong in suggesting (Br. 39) that the 1978 Act retroactively withdrew petitioner's immunity more than seven years after the Davidon wiretap. By its terms, the 1978 Act had only prospective effect (50 U.S.C. 1801 note), and the accompanying Senate Report recognized that Title III had "disclaimed any intention of legislating in the national security area" (S. Rep. 95-604, 95th Cong., 2d Sess. 12 (1978)).

respect to these decisions. Our submission is that such a constraint is unwise and unnecessary.

For these reasons and the reasons set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case should be dismissed.

REX E. LEE
*Solicitor General*

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